No. 2379

United States

Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. M. NELSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For the Fairbanks, Morse & Company, a Corporation, Plaintiff in Error:

STUTSMAN & STUTSMAN, Esqs., 903 California Building, Los Angeles, California.

For J. M. Nelson, the Defendant in Error:

COLLIER & CRAIG, Esqs., Riverside, California. [4*]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Hon. OLIN WELLBORN, Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

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*Page-number appearing at foot of page of original certified Record.

the said District Court before you, between Fairbanks, Morse & Company, a Corporation, plaintiff in error, and J. M. Nelson, defendant in error, a manifest error hath happened, to the damage of Fairbanks, Morse & Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so [5] that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this the 28th day of January, A. D. 1914.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court of the Southern District of California.

Allowed this the 28th day of January, A. D. 1914.

OLIN WELLBORN,
United States Judge.

I hereby certify that a copy of the within Writ of Error was on the 28th day of January, 1914, lodged in the Clerk's office of the said United States District Court, for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy. [6]

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Writ of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the United States District Court, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

183—AT LAW—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Complaint.

Plaintiff, for cause of action herein, and complaining of the above-named defendant, avers and states:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the general incorporation laws of the State of Illinois, with its principal place of business in the city of Chicago in said State and doing business in said State.

II.

That the defendant is a citizen of the State of California, and a resident of the County of Riverside in said State.

III.

That heretofore, to wit, on or about March 25, 1912, in the County of Riverside, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which is hereto attached as exhibit "A" and by this reference, made a part hereof.

IV.

That, pursuant to the terms of said written contract, the defendant made, executed and delivered to the plaintiff his three promissory notes in the sum of $1200.00 each due and payable June 25, 1912, March 25, 1913, and March 25, 1914, respectively, copies of which notes are hereunto attached and marked respectively, exhibits "B," "C" and "D."

V.

That, pursuant to the terms of said written contract aforesaid, [11] the plaintiff agreed to sell

and the defendant agreed to buy one certain 60 horse-power Fairbanks-Morse Oil Tractor and certain equipment for the sum of $3,600.00, and that, pursuant to the terms of said written contract, the plaintiff delivered to the said defendant and the said defendant received from the plaintiff the said Oil Tractor and the said equipment at the town of Alessandro in said Riverside County, California, and the plaintiff has complied in all respects upon its part with said written contract with the defendant.

VI.

That, as required therein, the plaintiff furnished to the defendant a competent man for a period of two days within ten days of the receipt of the said engine by defendant for the purpose of operating and demonstrating the said engine, and that thereafter the defendant continued to use and operate the said engine until the present time with full knowledge of its capacity.

VII.

That, although demand has been made upon defendant by plaintiff for the payment of the promissory note which became due June 25, 1912, the said note or any part thereof has not been paid by the defendant to the plaintiff, and, under the terms of the said written contract between the said parties the entire amount of said purchase price together with interest became due and payable at the option of the plaintiff which option is now so exercised by said plaintiff.

VIII.

That by the terms of the said written agreement

the defendant promised and agreed to pay all attorney's fees and expenses incurred [12] by plaintiff in the collection thereof and plaintiff avers that it has become necessary to employ and plaintiff has employed Messrs. Stutsman & Stutsman, Attorneys at Law of Los Angeles, Calif., to commence suit and enforce collection thereof and that the sum of $360.00 is a reasonable sum to be allowed as attorney's fees herein and is the amount agreed to be paid by the defendant under the terms of the said notes.

IX.

That no part of the said notes or of the said attorney's fees have been paid by the defendant to the plaintiff and the whole thereof is now due, owing and unpaid.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $3,600.00, together with interest thereon as provided by the terms of the promissory notes, given at the time of the execution of said written contract, and the further sum of $360.00 as attorney's fees to plaintiff's attorneys and costs of suit herein.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff. [13]

Exhibit "A" [to Complaint].

FAIRBANKS-MORSE GAS AND GASOLINE ENGINES.

Los Angeles, Cal., Mar. 25, 1912 .... *19*...

Mr. J. M. Nelson,

Moreno, Cal.

Dear Sir:—

We hereby propose to furnish one 60-H. P. (actual) Fairbanks-Morse Oil Tractor, F. O. B. Alessandro, Cal.

This engine has been tested at our factory at Beloit, Wis., with a break test and "Fairbanks" scale and over 60 actual horse-power developed.

With this engine we furnish one ..... pulley; one galvanized steel supply tank, with necessary pipe and fittings to connect tank; exhaust pipe and fittings; one electric ignitor and battery; necessary wrenches and oil can; and with each Fairbanks-Morse horizontal engine, over 8 H. P., we furnish our XXX.

The bearings of this engine are of XXXX and the crank shaft and connecting rod of forged steel. The valves are water jacketed.

We guarantee this engine and all other machinery furnished hereunder to be made of good material and in a workmanlike manner and if any part of said engine or machinery shows defective material or workmanship within one year, we agree to furnish a new part free of cost to replace such defective part, but we assume no liability for, nor will we be responsible for damages or delays caused by such defective material or workmanship, nor will we make any al-

lowance for repairs or alterations made by others, unless some are made with our written consent.

With the above engine we also propose to furnish:

Above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine, we agree to furnish a competent man for 2 days within 10 days of receipt of engine at Alessandro. This man to operate and demonstrate [14] the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not. If you find engine is not sufficient for your needs, you agree to give our men all necessary assistance loading the engine at Alessandro, pay freight on same to Los Angeles and this contract becomes void.

The price of above machinery is $3600.00 Thirty-six hundred..... .....Dollars payable in gold coin at the office of Fairbanks, Morse & Company, Los Angeles, California, which sum said J. M. Nelson agrees and promises to pay as follows:

$1200.00 cash on or before June 25, 1912.
1200.00 " " " " Mar. 25, 1913.
1200.00 " " " " Mar. 25, 1914.

All deferred payments to be evidenced by promissory notes dated Mar. 25, 1912, bearing seven per cent interest per annum, and if each and every payment is not made when due as above provided, then the entire amount, together with interest, shall immediately become due and payable at our option. You agree to pay all attorney's fees and expenses in-

curred by us in the collection thereof; whether suit is filed or not.

The title and right of possession to the property furnished under this agreement shall remain in Fairbanks, Morse & Company until all payments hereunder (including deferred payments and any notes, judgments or renewals thereof, if any) shall have been fully made in U. S. gold coin and the machinery and equipment herein described shall remain the personal property of Fairbanks, Morse & Company, whatever may be its mode of attachment to realty or otherwise, until fully paid for in U. S. gold coin and upon failure to make payments (or any of them) as herein provided, we may retain any and all payments which may have been made as liquidated damages, and may deny the use of said property or any part thereof [15] and be free to enter the premises where said machinery or equipment may be located, and to remove the same as our property without process of law and without prejudice to any further claims on account of damages which we may suffer from any cause, and we shall not be liable in any action at law or in equity for removing our property hereunder.

It is agreed that upon acceptance of this proposal we will make delivery of above machinery without unnecessary delays, and that the purchaser will receive the property herein specified in accordance with the terms of this contract, and shall become responsible therefor after its delivery at the point designated herein. The Purchaser also agrees to make good any loss to Fairbanks, Morse & Company,

occasioned by fire or any other cause after delivery at the point designated herein, and until the full amount herein agreed upon has been paid.

It is understood that we shall not be held responsible for any delay in delivery or loss occasioned thereby, which shall be caused by fire, strikes, non-receipt of material required, delays in transit, or any other cause beyond our control; also that the acceptance of apparatus by purchaser shall constitute a waiver of all claims for damages or loss occasioned by any delay which may have occurred.

Cancellation of this contract may be accepted by us under conditions satisfactory to us, in which case purchaser agrees to pay not less than twenty per cent of contract price.

It is understood that this contract is the only one existing between the parties hereto, and that all communications or understandings, either verbal or written, contrary to this proposal and specifications, are hereby withdrawn and annulled.

This contract is subject to the written approval of the Agent of Fairbanks, Morse & Company at Los Angeles, California, and when so approved shall immediately become binding on all [16] parties hereto.

Respectfully submitted,
FAIRBANKS, MORSE & CO.
By (Signed) H. J. REULAND.

Accepted:
(Signed) J. M. NELSON.

Approved:
'Signed' C. KNAGENHELM.

References:
OK.—MEYER
DILLE.
COPY.
(Endorsed):

CONTRACT.
No. .....
With
.....

Engine No. .....
Price $.....
Date .....
Shipped.....
Payable .....
Sold by .....
Erected by .....
[17]

Exhibit "B" [to Complaint].

$1200.00. Los Angeles, Calif., Mar. 25, 1912.
No.

Fairbanks Standard Scales.

Windmill World Eclipse Trade Mark.

Ninety days after date for value received I promise to pay to FAIRBANKS, MORSE & CO. Inc., or order at Citizens' National Bank, Los Angeles, Twelve hundred ....Dollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the

hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Cal.

"

"

COPY. [18]

Exhibit "C" [to Complaint].

$1200.00. Los Angeles, Calif., Mar. 25, 1912.

No.

Fairbanks Standard Scales. Windmill World Eclipse Trade Mark.

One year after date for value received I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order at Cit. Nat'l Bank, Los Angeles, Cal., Twelve hundred ..... Dollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Calif.

"

"

COPY. [19]

Exhibit "D" [to Complaint].

$1200.00. Los Angeles, Calif., March 25, 1912.

No.

Fairbanks Standard Scales.

Two years after date for value received I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order at Cit. *B*at'l. Bank, Los Angeles, Cal., Twelve hundred.....

Windmill World Eclipse Trade Mark.

Dollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Cal.

"

"

COPY. [20]

State of California,

County of Los Angeles—ss.

C. Knagenhelm, being by me first duly sworn, deposes and says: that he is agent for plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon

his information or belief, and as to those matters that he believes it to be true.

C. KNAGENHELM.

Subscribed and sworn to before me this 22 day of July, 1912.

[Seal] J. F. DAVENPORT,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 183—Civil. At Law. In the District Court of the United States, in and for the Southern District of California, Southern Division. Complaint. Money Due on Contract. Fairbanks, Morse & Co. vs. J. M. Nelson. Stutsman & Stutsman, 903 California Building, Los Angeles, Calif., Attorneys for Plaintiff. Filed Jul. 22, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[21]**

[Summons.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Action Brought in the Said District Court, and the Complaint Filed in the Office of the Clerk of Said District Court, in the City of Los Angeles, County of Los Angeles, State of California.

The President of the United States of America, Greeting, to J. M. Nelson.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages, demanded in the complaint, as arising upon contract or will apply to the Court for any further relief demanded in the complaint.

WITNESS, the Honorable OLIN WELLBORN, Judge of the District Court of the United [22] States, in and for the Southern District of California, this 22d day of July, in the year of our Lord, one thousand nine hundred and twelve, and of our Independence the one hundred and thirty-seventh.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 25 day of July, 1912, and personally served the same on the 29 *July* day of July, 1912, by delivering to and leaving with J. M. Nelson, said defendant named therein, personally, at the County of Riverside, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,
U. S. Marshal.
By E. Dingle,
Deputy.

Los Angeles, July 29, 1912.

[Endorsed]: Original. Marshal's Civil Docket No. 1943. No. 183–Civil. U. S. District Court, Southern District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Summons. Stutsman & Stutsman, Plaintiff's Attorneys. Filed Jul. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. 2 Com. L. 21. [23]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Answer.

Comes now J. M. Nelson, defendant in the above-entitled action, and answering the complaint of the plaintiff herein, admits, denies, and alleges, facts as follows:

I.

Answering the first paragraph of plaintiff's complaint, this defendant states that he has no information or belief as to whether or not the plaintiff in this action is a corporation organized and existing or a corporation organized or existing under and by virtue of the general corporation laws of the State of Illinois; or as to the location of the principal place of business of the corporation in said state; or any other state, and, placing his answer upon these grounds, denies that the said plaintiff is a corporation organized and existing or organized or existing under the general or any incorporate laws of the State of Illinois or any other state, and denies that said corporation has its principal place of business in the City of Chicago, State of Illinois.

II.

This defendant admits the allegations in the second paragraph of plaintiff's complaint. [24]

III.

This defendant admits that on or about the 25th day of March, 1912, in the County of Riverside, the plaintiff prepared a contract, signed by H. J. Reuland and approved by C. Knagenhelm, as the same is set out by copy attached to plaintiff's complaint as exhibit "A"; that this defendant signed the same

as accepted at or about the date March 25th, 1912, as shown upon said contract, but this defendant avers that said contract is unintelligible and by mistake and oversight does not express the agreement as made by the parties in the following particulars; that the language in said contract is as follows: "For the purpose of testing out engine we agree to furnish a competent man for 2 days within 10 days of receipt of engine at Alessandro." That said language is unintelligible and meaningless, and was not the language used, or in that respect the contract made by and between the parties, and that the same was inserted in said contract by mutual mistake, and oversight before said contract was signed; that this agreement with respect to said matter was as follows: That within two days after the delivery of said engine to Alessandro for the purpose of testing out said engine the plaintiff, Fairbanks, Morse & Company, agreed to furnish a competent man for the purpose of testing out said engine, and to operate and to demonstrate the same, during regular working hours for five days, and that this defendant on or before the end of the fifth day, was to decide whether said engine complied with his requirements or not; and this defendant alleges that said contract should be reformed and corrected to express the agreement of the parties so made at the time of and before the signing of said contract; and that this contract as above stated and corrected was the only contract made or agreed to be made between this defendant and the plaintiff [25] or its agents.

IV.

Defendant admits the allegation contained in the fourth paragraph of plaintiff's complaint. This defendant admits that on or about the first day of April, 1912, the engine was delivered on board the cars at Alessandro station, in Riverside County, California, and was unloaded from the cars at said station; *but* this defendant denies that the plaintiff has complied in all respects upon its part with the written contract as made and entered into by and between the parties hereunto, for this defendant alleges that by the terms of said agreement, it was understood and agreed by and between the parties, and the said engine was to be sold with such understanding and agreement that the same should prove adequate to perform the work of this defendant; that the said engine did not so prove adequate to perform the work of this defendant in accordance with the terms and guarantee of the plaintiff; that the said engine upon being delivered to the plaintiff at Alessandro and removed to the premises of this defendant, after all the changes and suggestions made by the plaintiff, and the engine failed entirely to perform the work of this defendant in the manner and to the extent both desired by this defendant and as represented to the defendant that the same would perform the work of the defendant.

That at the time of the removal of the same to the premises, after its delivery at Alessandro, the ground was wet and soft, and the attempt to operate the same proved a failure; that the agent and representative of the plaintiff remained on the grounds a few

hours endeavoring to operate the machine, and finally conceded that the ground was too wet and that the same could not, under those conditions and circumstances, be made a success, and within an hour or two after the agent of said plaintiff left the premises and left said machine in the hands of the [26] defendant, the same broke down and became absolutely worthless and helpless; that at the time of the attempt so made as stated hereinabove, the representative determined that the band or tire of the large drive-wheel of the engine was too narrow for the soil in which it was to be operated, and determined that the same would have to have an extension put on in order to make the same wider and give it greater bearing on the soil, and that in order to operate the same successfully, defendant declared his purpose of having such extension made and put on the machine.

That this defendant with the knowledge of the plaintiff still attempted to operate the machine without such band; that at all times while the defendant tried to operate, the same was a failure; that this defendant could make no time over the ground with the machine, that when it was in operation, it did not travel over his field drawing his plow at a greater speed than about a mile and one-half per hour, when it should have accomplished its work at the rate of about two and one-half miles per hour.

That during the first month and a half, and before any extension was put on the wheel as aforesaid, the machine broke down three times; plaintiff sent its men to repair and replace the broken parts and a large part of the time of the month and a half, the

machine stood idle, and the defendant was able to accomplish nothing with it, whatever.

That the plaintiff, also, by its agents, informed the defendant that the machine would do his work if he would purchase some other kind of plows than the ones in use on his farm, and some time after the said extension was put on, he did purchase a different kind of plow at a very large expense of some four or five hundred dollars; attached them to the machine, and upon endeavoring to operate the same, found that the machine made no better progress, and proceeded with his work at the same slow pace [27] and a pace much slower than the machine was represented to accomplish his work and slower than was practicable for the accomplishment of the work which this defendant desired to and purchased the machine to accomplish, and that the same proved an entire and complete failure, and did not in any manner comply with, or prove adequate for the work of the defendant, and the warranty and guaranty as to the engine and the work it would accomplish for the defendant was a complete and entire failure.

And this defendant further alleges that the plaintiff never at any time, either for two days or five days during regular working hours, sent or kept any representative of said plaintiff with said machine for the purpose of testing the same out, nor did the plaintiff at any time either for two days or for five days during regular working hours, continuously keep any representative of the Fairbanks-Morse Company with said machine to test the same, to operate the same, and to demonstrate the same, although this

defendant demanded and requested from time to time that the plaintiff should comply with the contract and should send a man to properly test and demonstrate the machine, and show to this defendant that the same would do his work in accordance with the guarantee and warranty as made in said contract; that the plaintiff failing to comply with this demand, this defendant notified the plaintiff that he was ready and willing at any time to assist the plaintiff or its employees in accordance with the terms of the contract to place the same on board the cars at Alessandro and was ready and willing to pay the freight on the same back to the City of Los Angeles, as specified in said agreement, and that the plaintiff absolutely refused and declined to accept the same, and refused and declined to send some representative to assist in loading the same; whereby and by reason whereof, the obligation of this defendant to pay the said notes or any part of the same [28] became null and void and of no effect, and the said contract became and was absolutely rescinded and void.

This defendant further avers that by reason of the facts set out and alleged hereinabove that the plaintiff herein waived at all times all provisions of said contract with reference to the time in which the said machine was *to tested* by, from time to time making changes on the same, waiting for weather and proper conditions of the soil, changes in plows, additional bands to be placed on the same, and continuously made excuses for the machine and proposed changes in order that they might demonstrate that the machine under different conditions would prove adequate to

do the work of this defendant, and that this defendant never at any time waived his right to have the machine properly tested by the plaintiff herein or its agent, in accordance with the terms of said contract.

And this defendant alleges that the notes and contract sued on in this action are void and of no effect, and never became due from the defendant nor did this defendant become obligated at any time to pay the same or any part of the same to the plaintiff in this action, or to pay any attorneys' fees or any other costs or expenses connected with this or any other litigation.

WHEREFORE this defendant prays that the said contract may be reformed and corrected to express the intention of the parties, and that judgment of this Court be entered, that the plaintiff take nothing by its action, and that the defendant have judgment for his costs hereinabove expended against the plaintiff.

J. M. NELSON. [29]

State of California,
County of Riverside,—ss.

J. M. Nelson, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the allegations of the same are true of his own knowledge except as to matters therein stated on his information and belief, and as to those matters, he believes the same to be true.

J. M. NELSON.

Subscribed and sworn to before me this 15th day of August, 1912.

[Seal] A. C. LEWIS,
Notary Public in and for the County of Riverside, State of California.

Personal service of the within answer and receipt of a copy thereof, is admitted this 16 day of August, 1912.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

[Endorsed]: No. 183—Civil. Dept. No. ——, District Court of the United States, Southern District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Answer. Filed Aug. 17, 1912. Wm, M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Collier & Craig, Attorneys for Defendant, Riverside, California. [30]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Amendment to Complaint.

Now comes the plaintiff in the above-entitled cause and with leave of Court first had and obtained,

hereby offers and files the following Amendment to its complaint.

1.

Strike out all of paragraph three (3) in the original complaint and in lieu thereof insert the following:

"That heretofore, to wit, on or about March 25, 1912, in the County of Los Angeles, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which is attached to the original complaint herein as exhibit 'A' and by this reference made a part hereof."

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

C. Knagenhelm, being by me first duly sworn, deposes, and says: That he is the agent of Fairbanks, Morse & Co., a foreign corporation, in the above-entitled action; that he has heard read the foregoing Amendment to Complaint, and knows the contents thereof; and [31] that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

C. KNAGENHELM.

Subscribed and sworn to before me this 19 day of March, 1913.

[Seal] C. A. STUTSMAN,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: 183—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Amendment to Complaint. Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. ————, Deputy. Stutsman & Stutsman, Attorneys for Plaintiff. [32]

In the District Court of the United States in and for the Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Stipulation Waiving Trial by Jury.

It is hereby agreed and stipulated by and between counsel for plaintiff and counsel for defendants in the above-entitled cause that a trial of this cause by a jury be and the same is hereby expressly waived, and the parties hereto agree that the trial of the issues framed by the pleadings herein may be by the court sitting without a jury.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.
COLLIER & CRAIG,
Attorneys for Defendant.

[Endorsed]: 183—Civil. In the District Court of the United States, in and for the Southern District

of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Stipulation Waiving Trial by Jury. Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. ————, Deputy. Stutsman & Stutsman, Attorneys for Plaintiff. [33]

In the District Court of the United States in and for the Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 19th day of March, 1913, before the Court without a jury, a jury trial having been duly waived by the parties; Messrs. Stutsman & Stutsman appearing as attorneys for plaintiff and Messrs. Collier & Craig appearing for defendant. Whereupon oral and documentary evidence was introduced on behalf of both plaintiff and defendant, and the cause was thereupon submitted to the Court for determination, and after due consideration thereof the Court finds from the evidence introduced the facts as follows, to wit:

(1) That the plaintiff is a corporation organized and existing under and by virtue of the general incorporation laws of the State of Illinois, with its principal place of business in the city of Chicago in

said State, and doing business in said State, and that the defendant is a citizen of the State of California and a resident of the County of Riverside in said State.

(2) That on or about the 25th day of March, 1912, in the County of Los Angeles, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which said contract is attached to the original [34] complaint herein and marked exhibit "A."

(3) That pursuant to the terms of said written contract the defendant made, executed and delivered to the plaintiff his three promissory notes in the sum of $1200.00, each due and payable June 25, 1912, March 25, 1913 and March 25, 1914 respectively, copies of which notes are attached to plaintiff's complaint herein marked respectively exhibits "B," "C" and "D."

(4) That pursuant to the terms of said written contract aforesaid the plaintiff agreed to sell and the defendant agreed to buy one certain 60 horse-power Fairbanks-Morse Oil Tractor and certain equipment, for the sum of $3,600.00. That it was provided in said contract and so understood and agreed by the parties hereto that said engine or tractor should prove adequate for the defendant's work. That the plaintiff has not complied in all respects upon its part with the said written contract with the defendant; that the engine or tractor for the sale and purchase of which said contract provided did not prove adequate for defendant's work, as understood and agreed by the parties and so provided in said con-

tract; and there was a breach of the warranty contained in said contract.

(5) That no evidence was introduced by the defendant at the trial upon the issue that the said contract did not express the agreement as made by the parties or upon the issue of whether said contract should be reformed, but that said issue was abandoned by the defendant.

(6) That the plaintiff through its authorized agents represented to the defendant that said engine or tractor could be made adequate for defendant's work by the addition of extensions upon the drive-wheels of said engine, and promised and agreed to furnish such extensions at its own cost and expense, and that the defendant with the knowledge of the plaintiff attempted to operate the machine without such extensions. That [35] after the addition of said extensions to said drive-wheels the said engine or tractor did not prove adequate for defendant's work, and upon the representation of the plaintiff that a different kind of plows were necessary to be used in connection with said tractor the defendant obtained such plows within a reasonable time, and that when used in connection with said plows the said engine or tractor still proved to be inadequate for defendant's work and that the said engine or tractor did not comply with or prove adequate for the work of the defendant and the warranty and guarantee as to the engine and the work it would accomplish for the defendant was a complete and entire failure.

(7) That said contract provided by its terms that the defendant should on or before the fifth day from

Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Collier & Craig, Attorneys for Defendant. Riverside, California.

Personal service of the within and receipt of a copy thereof is admitted this 11th day of September, 1913.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff. [38]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Judgment.

This cause came on regularly for trial on the 19th day of March, 1913, Messrs. Stutsman & Stutsman appearing as attorneys for plaintiff and Messrs. Collier & Craig as attorneys for the defendant. A trial by jury having been waived by the parties the cause was tried before the Court without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence was introduced by the respective parties, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after deliberation thereon the Court files its find-

ings and decision in writing and orders that judgment be entered herein in favor of the defendant in accordance therewith.

WHEREFORE, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that Fairbanks, Morse & Company, a corporation, the plaintiff, take nothing by its action against the defendant J. M. Nelson; that the writ of attachment herein issued be and is hereby discharged; and that the said defendant J. M. Nelson do have and recover of and from Fairbanks, Morse & Company, a corporation, the plaintiff, his costs and disbursements incurred in this action amounting to the sum of One Hundred Forty 40/100 (140.40) Dollars.

JUDGMENT entered September 22d, 1913.

WM. M. VAN DYKE,
Clerk.
By C. E. Scott,
Deputy Clerk.

[Endorsed]: No. 183–Civil. United States District Court, Southern [39] District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. (Copy of) Judgment. Filed Sep. 22, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [40]

[Certificate of Clerk U. S. District Court to Judgment-roll.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a true copy of the JUDGMENT entered in the above-entitled action, and recorded in Judgment Book No. 2 of said Court for the Southern Division, at page 222 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the seal of said District Court, this 22d day of September, A. D. 1913.

[Seal] WM. M. VAN DYKE,
Clerk.
By C. E. Scott,
Deputy Clerk.

[Endorsed]: No. 183–Civil. In the District Court of the United States for the Southern District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Judgment-roll. Filed Sep-

tember 22, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judg. Register Book No. 2, page 222. [41]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

Conclusions of the Court on Trial.

The warranty which plaintiff gave to defendant was as follows:

"Above engine is sold with the understanding that it proves adequate for your work."

There is no room for controversy but that plaintiff's work consisted both of plowing and harvesting; and I am satisfied from the evidence, that the engine was lacking in the speed and heavier than represented, and, besides, would not plow in the sandy places testified to by the witness Dickerson. On account of these defects, mainly lack of speed, it was inadequate for defendant's work; indeed, plaintiff virtually admitted this by furnishing and attaching, without cost to defendant, extensions to the wheel bands, as set forth below.

My conclusion on this branch of the case is, that there was a breach of the warranty.

II.

While the engine was being tried on defendant's ranch, April the 2d, 1912, Nelson testifies, that he called Reuland's attention to the fact, that the bull wheels sunk into the ground, cutting ruts several inches in depth, and Reuland represented [42] to him that extensions on said wheels would remedy the trouble, and, that such extensions would be provided in about ten days. (Nelson, pages 21, 33.) It is true, that Reuland denies making these representations (Transcript, 23), but Nelson is fully corroborated by the well established and pivotal facts, that the extensions were furnished and attached to the wheels at the instance and cost of plaintiff.

I am of opinion, that plaintiff's representations, promises and acts in the matter of these extensions were a waiver of the five days' limitation provided for in the contract, and, that the effect of this waiver was to give the defendant a reasonable time in which to decide whether or not the engine complied with his requirements.

This limitation, had it been effectual, would have forfeited a valuable right of the defendant, and was solely for the benefit of the plaintiff. These circumstances bring the case at bar within the doctrine of Knarston vs. Manhattan Life Insurance Co., 140 Cal. 57, as to waiver, and render inapplicable sec. 1698, Civil Code, as well as Hennehan vs. Hart, 127 Cal. 656, and others in line therewith, construing said section.

Said extensions did not appreciably increase the

speed of the engine, but, of course, added to its weight.

Disc plows were then suggested by plaintiff as a remedy. They were procured on May the 28th by the defendant, at a cost of $438.00, but also proved ineffectual; whereupon defendant telephoned plaintiff, that the engine was not doing the work required, and received a promise, in substance, that Mr. Reuland would go out and see about it. On June the 4th, defendant wrote to plaintiff, complaining still that the engine did not make the proper time, and wrote again on the 7th of the same month. Plaintiff replied to these letters June 11th, saying, among other things, [43]

> "We regret that our Mr. Reuland has not been able to reach you as yet. From a letter we received from him this morning, we understand he has been spending his time around San Bernardino and Redlands, but as he contemplates spending his time in Perris Valley this week, we hope before you receive this letter that he has visited you."

On June 13th, defendant, hearing nothing further from plaintiff up to that time, stopped the engine, and, the next day, notified plaintiff by letter, that the engine was still lacking in speed and of his readiness to return it.

Considering the finding I have already made, that there was a breach of the warranty, and the numerous hindrances to defendant's tentative operations of the engine by the breaking and replacement of its parts, for which he was in no way responsible, and the representations, promises and conduct of the

plaintiff with reference to the extensions and disc plows, and defendant's complaints May 29th, June 4th, and June 7th, as to the engine's lack of speed, and plaintiff's responses, to the effect, that the matter would have Reuland's attention, together with defendant's obvious desire and purpose to retain the engine, if, upon fair trial, it proved adequate to his work, I am of opinion, that his decision, announced June the 14th, 1912, to return the engine, was not unreasonably delayed.

Jackson vs. Porter Land & Water Company, 151 Cal. 32, does not contravene this conclusion, but one element of it is supported by the following extract from said case:

> "This duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case." (Page 39.) **[44]**

Section 1691 of the Civil Code is inapplicable, because the question here is not one of rescission, where promptness is required, but of acceptance, where reasonable time is the rule.

Directly in point, however, is the following extract from a decision by the District Court of Appeals of this State, underscoring mine:

> "The delay in the rescission of the contract has also been adverted to and was excusable for the reason mentioned. 'If the return of the machine warranted to do good work and found upon trial to be unfit for use is delayed at the request of the

manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed.' (Fox vs. Stockton etc., Works, 83 Cal. 333.) The buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or his agent *or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects.* (30 Am. & Eng. Ency. of Law, p. 188.)" See, also, note 2 on said page. (Luitweiler etc. Co. vs. Ukiah Water Co., 16 Cal. App. 198.)

The authorities cited in said note strongly support the underscored clause of the *test,* and are: Jacobs vs. Crumbaker et al., 67 Ill. App. 391; The McCormick Harvesting Machine Co. vs. Hays, 89 Ind. 582; Kenney vs. Bevilheimer et al., 158 Ind. 653; and Walter A. Wood M. & R. M. Co. vs. Calvert, 89 Wis. 640.

The same doctrine is strongly supported by another California case, Sherman vs. Ayres, 16 Cal. App. Decisions 41.

Many other cases to the same effect are cited in defendant's brief, but it is unnecessary to enumerate them here.

Judgment will be entered for the defendant, and his attorneys are requested to prepare and submit to the Court suitable [45] findings, after serving a copy of the same on plaintiff's attorneys.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 183–Civil. U. S. District Court, Southern District of California, Southern Division. Fairbanks, Morse & Company, a Corporation, vs. J. M. Nelson. Conclusions of the Court. Filed September 2, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [46]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

AT LAW—CAUSE NO. 183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED, that in the trial of this cause on the 19th day of March, A. D. 1913, the Honorable OLIN WELLBORN, presiding, both parties appearing by counsel; the plaintiff represented by Messrs. Stutsman & Stutsman, and the defendant by Messrs. Collier & Craig, a trial was had to the court, a trial by jury having been waived, and a written stipulation waiving trial by jury having been offered and filed in the cause and the following proceedings had:

Counsel for plaintiff stated that this was an action at law based upon diversity of citizenship and that the plaintiff, an Illinois corporation, made a written contract with the defendant, a citizen of California, by the terms of which plaintiff agreed to sell and defendant agreed to buy an oil tractor,

for which defendant agreed to pay the sum of $3600.00, in installments of $1200.00 each, evidenced by promissory notes, payable April 25, 1912, April 25, 1913, and April 25, 1914, the contract providing that a failure to pay any note or installment gave plaintiff the right to declare the entire indebtedness due. Counsel stated that the first note was due and unpaid, and plaintiff had elected to declare the entire indebtedness due, and that no part of [47] the purchase price of said tractor had been paid by defendant. That plaintiff had delivered the said tractor to defendant according to contract, and defendant refused to pay for the same. That the contract provided that plaintiff should furnish a man for a period of two days within ten days after the engine was received by the defendant for the purpose of testing the engine, and that defendant agreed in the contract that on or before the fifth day, he was to decide whether the engine was adequate for his needs, it being specified in the contract that the engine was sold with the understanding that it proved adequate for the defendant's work. Counsel proposed an amendment to the complaint by which the allegation in the original complaint that the contract was made and entered into in Riverside County was changed so that it might appear that said contract was entered into in Los Angeles County, to which offer no objection was made by counsel for defendant, providing it be deemed that the amendment was denied. Counsel for defendant stated that it would be contended that the engine was not adequate for defendant's needs, and that plaintiff had not complied with said contract upon its part, and

that therefore there was no consideration for the said notes, and the same were void and defendant was not indebted to plaintiff. Counsel for defendant thereupon read defendant's answer beginning at paragraph III thereof.

Plaintiff offered in evidence a certified copy of the Articles of Incorporation of Fairbanks, Morse & Company, under seal and signature of the Secretary of State of the State of Illinois, whereupon the same was filed without objection and marked Plaintiff's Exhibit "A."

Whereupon, counsel for plaintiff offered in evidence the contract entered into between the parties which was filed without objection by counsel for defendant, except a certain lead pencil interlineation which was no part of the contract [48*—2†] and was marked as Plaintiff's Exhibit "B."

Counsel for plaintiff thereupon offered in evidence three promissory notes, each dated March 25, 1912, each for the sum of $1200.00, and each signed by the defendant, J. M. Nelson, to the offer of which notes there was no objection by counsel for defendant, and the same were received in evidence as Plaintiff's Exhibits "C," "D" and "E," respectively.

[Testimony of Frank J. Reuland, for Plaintiff.]

FRANK J. REULAND called as a witness for plaintiff, and testified among other things as follows:

I am an employee of Fairbanks, Morse & Com-

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of Frank J. Reuland.)

pany, and under instructions went to defendant's ranch in Riverside County on April 1, 1912, to demonstrate the oil tractor in question. I was accompanied by A. McDearmon, another employee. We met the defendant and Ferguson at Alessandro station, on the Santa Fe Railroad, where we unloaded the tractor, leaving the station about 2 P. M., and under its own power proceeded to the ranch of defendant, which we reached about seven o'clock that evening. The next morning we got the engine ready and drove it into the field under defendant's directions after plows had been attached, and started to plowing. I don't remember how many acres we plowed, but we put in the day plowing moving from one field to another. I was not personally present the full day, but McDearmon was. The defendant was present most of the time and McDearmon instructed him about the starting of the engine and the stopping and the oiling and about the different parts. On the 2d day of April McDearmon started with the engine and plowed all day, commencing between seven and seven-thirty in the morning and working until about sundown. [49—3] Nelson was present most of the time and his employee, Ferguson, was present all day. We worked until 4:25 o'clock that evening, which hour I remember distinctly, since we were going to drive to Los Angeles, and I pulled out my watch to see. Before we left, we talked with Nelson, asking him whether he was satisfied with the engine, and whether he thought he could get along with it and whether he desired

any further instructions, and whether there was any reason why we should not leave, and he first asked his engineer and then told us there was no reason so far as he knew why we could not leave, because everything seemed to be running satisfactorily. I don't recall the exact words that were spoken, but that is the sum and substance of the conversation, which was betweeen Nelson, McDearmon and myself and Ferguson was present. I had spoken to Nelson earlier in the afternoon and told him that our time was up that evening, and that everything seemed to be running all right and we would like to get away that evening if we could, and he told us, that if everything continued to run as it was, we could leave. I don't remember the very words he used, but he said the engine was working nicely then, and if it continued that way the rest of the afternoon, he did not see why we could not get away, and he made no objections to our going. He did not say that he was not satisfied with the test, nor was there anything said at that time about the efficiency of the engine. He made no complaint about this and found no fault with the test, or the demonstration, and did not ask us to remain longer for a further test.

Cross-examination.

There might have been some statements made at that visit about putting wider bands on the large wheels of the machine. There was in regard to some very sandy and gravelly land Nelson had on the hillside, [50—4] and we thought if he wanted to

(Testimony of Frank J. Reuland.)

plow that by putting on extensions, but there was nothing said that we thought he should have them. If he wanted to spend the money we had them to sell. We were there right after a rain and the wheels sunk into the ground in some places. I know that they did furnish these extensions for those big wheels, but don't know whether they charged him for them. I went to Lake View about eight o'clock in the morning and got back about three P. M. and don't know anything of what happened or what was said while I was gone. There possibly may have been some conversation with me about the wider bands. I won't say that I didn't suggest the putting on of those wide bands. I don't know how much was plowed the first day they worked in the fields. On the 3d of April we stayed until 4:25 P. M., but don't know how far the tractor traveled during that day. They had on 18 plows, but dropped off 6 a part of the time. They thought possibly it was a little more load than there should be on a wet place. I don't know how long we had 18 plows on. This was called a 30–60 horse-power tractor. The 30 represents the draw-bar pull, which is a surplus power that you have left after the engine moves itself.

Redirect Examination.

There was some difference in the topography of Nelson's ground. Some of it was gravelly and sandy.

Recross-examination.

We have sold a good many tractor engines. I

(Testimony of Frank J. Reuland.)

don't know when I sold the first 30–60. I never went on a 30–60 oil tractor before then, and this was my first experience with this class of engine. I never showed one before except in our yards in Los Angeles. [51—5]

[Testimony of Stanley J. La Port, for Plaintiff.]

STANLEY J. LA PORT, a witness called for plaintiff, testified as follows:

I am cashier of Fairbanks, Morse & Company. I have the three notes in my possession executed by the defendant. These notes have not been paid, nor any part of them, nor the interest on the same.

[Testimony of A. McDearmon, for Plaintiff.]

A. McDEARMON, a witness for plaintiff, testified as follows:

I am an employee of Fairbanks, Morse & Company, and worked in the factory of plaintiff at Beloit, testing nearly all kinds of engines they made at that time, and since coming to Los Angeles have been engaged in erecting and testing engines, having been employed in Los Angeles for nine years. I have built engines from the ground up. Can take them apart and put them together again and know how to start and use them and to determine their efficiency for performing the work for which designed. Am familiar with how fast an engine should be operated and under what conditions as to soil and know how such an engine should be operated under certain conditions. I went with Reuland to defendant's ranch to instruct defendant in regard

(Testimony of A. McDearmon.)

to operating the engine. We arrived there April 1, 1912. After unloading the engine from the depot platform and filling the same with fuel and oil, we drove it to the defendant's ranch, arriving there at seven o'clock P. M. The next morning between seven and eight o'clock, we started up the machine, attached plows and pulled it over in the field. The defendant furnished the plows himself. The 2d of April we operated the engine all day except during the time we stopped on account of the plows and because of getting into wet places. No stops were necessary because of any defect in the engine or the operation of it. It pulled the plows and the only delays were due to outside causes. We returned to defendant's ranch the next day and went out and started the engine and plowed. During that day I had Mr. [52—6] Ferguson operate the engine probably half of the time. Mr. Ferguson was an employee of the defendant. I showed him about the oiling, about the fuel, how far to open his throttle valve, how to start his engine, and told him about keeping it up and different things to do, explaining the mechanical construction to some extent, but more especially the operating. We remained until half-past four or five o'clock. That was our second day, and we wanted to get into Los Angeles. I asked Nelson whether he thought he would have any trouble with the engine, and if he thought he could operate it all right, and he turned to Ferguson and asked Ferguson if he thought he understood it all right, and he said he did, and he says, "All right,"

(Testimony of A. McDearmon.)

and we bid him good-bye and got into the machine and went. He seemed to be satisfied with the operation up to that time. I cannot tell his exact words, but remember the substance of what he said. I asked him if we could go off with the machine when we were ready to go, and told him that we did not think he would have any trouble with the machine, and he said he guess not, and he turned and asked Ferguson if he could handle it, and Ferguson said that he thought he could unless something new came up, and then Nelson told me it would be all right, that we could go. **[53—7]**

I know what bands or extensions on the wheels are. They are a necessary part of the engine only on very loose ground and were not necessary for the operation of the machine itself, only to hold the machine up and hold it from slipping.

Cross-examination.

I, myself, said to Mr. Nelson that if we were going to plow in that loose stuff on the hills that I believed the extensions would be a good thing. They were about 16 inches wide. I did not tell Nelson that we would have to hurry to Los Angeles to get an order off by telegraph to get them into a car that was about to be shipped, and did not hear any such conversation. I did not tell him that the company would furnish them. It had been raining some before we got there. We got into mud so bad we had to get rails and bars to stuff under the wheels. I was running the engine which worked all right. I had told Nelson that the wet part of the ranch would

(Testimony of A. McDearmon.)

need those extensions in order to complete the machine or do the work; that I thought that would help. The first day that we started the machine we were working on a forty-acre piece and went a little more than once around in the forenoon, making several stops. When I say the engine worked all right, I mean that the engine ran up to speed. I never made any test at any time to show the mileage the machine was accomplishing or the exact distance it was making in any definite length of time. I had demonstrated with that tractor several times, but not in a field. This was the only one I had ever tested in the field.

I never saw a 30–60 tractor with plows attached being operated before that time. This was the first engine that I had anything to do with of this particular type and power that they had ever shipped out from the establishment. We moved to another field in the afternoon, but I don't [54—8] remember whether we made a circuit or not that day. We got into mud and into loose sand on a hillside and had quite a little trouble getting out, and used brush and cactus under the wheels to try to get them over that place. I think we got clear around, but I am not sure, that day.

The COURT.—When do you claim, Judge Collier, that notice was given to plaintiff that this engine was inadequate for the work the defendant wanted it to do?

Mr. COLLIER.—Our testimony will show that it was that very same day.

(Testimony of A. McDearmon.)

The COURT.—That is your position?

Mr. COLLIER.—Certainly.

That is the very first attempt they were making, and before they got away from there this extension was to be sent for to keep that on the ground and the pleadings practically so allege.

The witnesss further testified as follows: I put the extensions on the engines about six weeks later. On the second field we had three plows part of the time, and on the second day we dropped one plow. These details are not very fresh in my memory. The reason we gave to Mr. Nelson for going away was in order to get back to the city and get on some other job. In making the trip from Alessandro to the Nelson house we stopped twice; about fifteen minutes the first time and about five minutes the second. It took us pretty close to five hours to go that eight miles on the road.

Redirect Examination.

On the soft ground the weight of the engine alone would go down three or four inches without plowing, and with the plows behind the wheels would spin.

Recross-examination.

The machine in running from **[55—9]** Alessandro to the house was run most of the time on the high gear, and it is supposed to go faster on the high than on the low gear.

[Testimony of R. S. Ferguson, for Plaintiff.]

R. S. FERGUSON, a witness for plaintiff, testified as follows:

(Testimony of R. S. Ferguson.)

I have been employed by the defendant, and was working for him in March, 1912, until June of that year. The engine in question was used by us all day of the third of April. I was present when McDearmon and Reuland left that evening and heard some conversation. They asked Nelson if he thought he could get along all right, and he asked me if I thought he could run it, and I thought he could unless something turned up that I did not know anything about. Nelson then said to them, "All right," addressing his remarks to Reuland and McDearmon, and they told him they guessed they would go. After they left and until June sometime, during which time I worked for Nelson we plowed about six or seven hundred acres of land except some washes, the amount of which I do not know. He used horses all the time on other lands, but I don't know how much was plowed by the horses.

Cross-examination.

Just before McDearmon and Reuland left on the afternoon of the second day, I saw Nelson and Reuland talking together on the corner, but did not hear what they said. I did not hear them talking about any extensions on the bull wheels. I heard Nelson say something about putting extensions on. He told me.

The machine broke after we had gone about half of a quarter after Reuland and McDearmon went away. The gear shaft broke and after two or three days McDearmon fixed it. Then the differential shaft broke and it took two or three [56—10, 11]

(Testimony of R. S. Ferguson.)

days to fix that. It broke again and we had to stop, and it was probably a week before that shaft came back. There were some new bands put on at the time that the new shaft was sent out to take the place of the broken one. While the machine was idle waiting for these things I was plowing with horses. While the plows were in operation, and when the tractor was not in the mud and was moving over the ground it did not make the same time that the International made upon which I worked before. The bull wheels of the machine settled into the ground and made quite a furrow across the second piece that we worked on, and that continued during the two days that they were there. After the land got in better condition I don't know as I made any better time than when the ground was wet.

Redirect Examination.

I heard the talk between Nelson and McDearmon just before they left, but did not hear them talking off to one side. After the new steel shaft was put in the engine it worked all right, and the only trouble I had with it was with the batteries, and after I got a new shaft I did not have any more serious trouble, and most of the plowing done with the engine during the time I was there was done after the last steel shaft was put in.

Recross-examination, by Mr. COLLIER, for Defendant.

While I was operating that machine it never traveled and plowed under any conditions that I used it over a mile and a quarter an hour.

(Testimony of Henry Reuland.)

Objected to by plaintiff because incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff excepts upon the ground that same is incompetent, irrelevant and immaterial. **[57—12]**

Exception taken and allowed.

Statement by counsel for plaintiff that the notes provide for an attorney's fee of 10% and an offer made to introduce testimony as to the work done by the attorneys.

The Court inquired if there was any controversy as to the fee and counsel for defendant stated they were satisfied with a fee of 10%, and the Court stated that this would be ordered by the Court, if judgment rendered for plaintiff.

[Testimony of Henry Reuland, for Plaintiff.]

HENRY REULAND, a witness called by plaintiff, testified as follows:

I am employed by Fairbanks, Morse & Company, and am acquainted with the defendant and am a brother of the witness who testified this morning. My name is on the contract and I arranged the sale of this engine. I do not know of any steps ever being taken by defendant to load the engine on the cars for the purpose of returning it to Fairbanks, Morse & Company, and the defendant never made our men any offer to load the same on board the cars.

I saw the defendant the first week in June, 1912, and had a conversation with him in regard to the engine, and he stated that she was a dandy. "You

(Testimony of Henry Reuland.)

can't have her back if you want her." He said this in his back yard at Moreno.

Cross-examination.

Witness is handed a folder or circular by counsel for defendant entitled on the front page, "Fairbanks, Morse & Company, 30–60 Horse-Power Oil Tractor," and asked whether he used this circular in the negotiations to which he answered that he did. **[58—13]**

[Testimony of Frank J. Reuland, for Plaintiff (Recalled).]

FRANK J. REULAND, recalled, testified as follows:

As a mechanic and engineer, I have had fifteen years' experience, both in operating and in superintending work, and know the action of distillate as a fuel, and know what is required as to oil and water and am familiar with the speeds and how they are regulated by the gears, and know the horse-power of an engine like the one in controversy and how the same is determined, and know that the engine which was delivered to Mr. Nelson was the engine specified in the contract as being a 30–60 horse-power Fairbanks-Morse oil tractor. I know how much land the defendant had to plow and the conditions of the soil and of the efficiency of the engine, and the engine was capable of plowing the thousand acres which he told us he had to plow.

This engine, if pulling plows enough to plow a strip fifteen feet wide, would plow at the rate of fifty acres per day of 24 hours, and there are 44,560 square

(Testimony of Frank J. Reuland.)

feet in an acre. It would amount to 43 acres per day plowing a strip 12 feet wide.

Cross-examination.

I don't know that there were any evidences of either 43 or 50 acres having been plowed during the first day that we worked in the field, or the second day. My estimate of what could be plowed is made under ordinarily good conditions traveling one and three-quarters on the low gear and two and one-half miles on the high gear, and either gear suitable to operate it. I couldn't swear that the engine out there ever went as high as a mile and three-quarters in an hour because I didn't have a speedometer or anything to indicate the exact mileage in that way. I couldn't say that I ever **[59—14]** saw it on that land go any faster than a mile and a quarter an hour when it was trying to plow. I never timed it or had any specified distances. I don't know who ordered the bands or extensions; that is out of my jurisdiction. The weight given in the shipping receipt of this implement is 28,400 pounds.

The engine did not sink in the ground any more than ordinary, and I had not come to the conclusion that the engine in order to do that work had to have 16-inch extensions on each bull wheel and I did not suggest this to Mr. Nelson, or that we would send for them, and did not tell him that we had to leave in order to get in and get a telegram to Chicago to get them.

[Testimony of J. M. Nelson, in His Own Behalf.]

J. M. NELSON, the defendant, sworn on behalf of the defense, testified as follows:

I reside in Riverside County. In buying this engine, I negotiated with Henry Reuland.

Q. I show you a circular marked exhibit "A" for identification. Did he use that document in connection with the negotiation?

Objected to as incompetent, irrelevant and immaterial and because no claim in the pleadings that there were any misrepresentations.

The COURT.—The question is what were the needs, and was the engine capable of doing that work. I am not inclined to shut out any testimony, but would give it no weight if I find it is not competent.

Objection overruled. Exception. **[60—15]**

Witness identifies circular as the one used.

And testifies that he expected to summer-fallow fifteen hundred acres, or a little better, which should be done as near after January 1st, as possible. Should be done by May 1st or before. I wanted the tractor for drawing a combined harvester as well as plowing. I expected to run the engine night and day in order to get the land plowed before the moisture got down. The first day we pulled the machine out into a forty acre field where my man had taken some plows; six-gang plows, and three of them, with eight inch shares. It was a little after nine when we got started, and a little after half-past twelve when we got around the forty acre field, having traveled

(Testimony of J. M. Nelson.)

about one mile. The ground was wet and we had to pull around into the street to get around a wet place. There had been about an inch and a half to two inches of rain. The bull wheels made deep impressions on the land, perhaps from four to six inches deep. I called Reuland's attention to it, and he said we could overcome that by putting extensions on. He said there were twelve, fourteen and sixteen inch extensions, and said, "We will get the weights." Said they would hold the engine up off the ground and would give it tractive power, because the engine going down into the dirt could not go as fast as it could the other way. We went to another field in the afternoon and made one and a half miles with the tractor; part of the time with the plows jacked up with their rear ends out of the ground as far as possible. It took us about two hours to go the mile and a half. The soil was sandy on the east end and on the west end it was a black heavy loam. The sandy soil is tillable soil. The next [61—16] day we found we had to drop one six gang plow and work the rest of the day with two six gang plows, using two gangs with six shares each would give a strip eight feet wide. We were cutting a 180 field in two, going up about a two per cent grade. We found that the engine slipped some and backed up, and we would throw stones under or a cactus and that sort of thing, and then we dropped one of the plows. We had a great deal of trouble on the second round with the engine going down into the dirt from four to ten inches in the sand. This sandy land is tillable and

(Testimony of J. M. Nelson.)
has raised crops. The next day the tractor traveled from five and a half to six miles and in that distance we plowed about eight acres. On the first field of forty acres the first day we had plowed about an acre and a half. That evening, and about the time we quit operating on the last day, I had some conversation with Reuland at the northwest corner of the field. I went out to his automobile and he said they were going to leave.

I said to him, "You mean that you are going, but you are going to leave Mac," and he said that he would have to take Mac back to do some work on a ninety horse plant somewhere, and that he had to get home in order to telegraph to the factory where they make these extensions to get them on a car that they were loading so that the extensions could be gotten out here without any delay to be put on this tractor engine to hold it up on the ground so it could do the proper work it was sold to me to do. We had some further talk when we got back to the tractor.

Q. What was said then?

A. He said something about; he told McDearmon. He asked him if Ferguson could run it and Ferguson said something to me about running it and I did to him. **[62—17]**

Q. Do you remember what you said?

A. I asked Ferguson if he thought he understood how to run the machine, and he said he did, so they started up and McDearmon started the machine up.

Q. Was there anything said about your acceptance of it?

(Testimony of J. M. Nelson.)

A. Nothing said about my accepting the machine. This was about an hour after he told me they must hurry off.

The extensions came. I never wrote any letters or made any order in regard to them. McDearmon put them on. It was a little after four o'clock on the evening of April 3d, about 4:30 when they left. Reuland showed to me by putting on those extensions, measuring on his automobile head about how far it would be and that would give the wheels so much more bearing on the ground that they would have more tractive power so the engine could make better progress, and during this conversation he complained about my plows and said I should have disc plows. I did not buy any disc plows until later. From his asking my man if he thought he could run it, I understood I was to go ahead and do the best I could with the machine until he got the extensions there which would be about ten days. They came on the 11th of May, I believe. They never demanded pay for them or sent me a bill for them. Henry Reuland came to my ranch two or three days and looked the engine over where it was standing in the field and asked if I would pay the freight if they would send the extensions for the wheels, and I told him I would pay the freight from Los Angeles. The extensions weighed something better than 2400 pounds, and this was additional to the original weight of the machine, which was 28,400 pounds. After the men left that night, we operated the engine for about twenty minutes when it broke down. One

(Testimony of J. M. Nelson.)

of the boxings broke and the gear casing dropped, due to a bolt breaking which holds up **[63—18]** one of the transmission shafts. I sent word to the company and they sent a man there to fix the engine. On the 16th of April, we began again and used it until the 19th, when the differential shaft broke, and the company again sent a man to put in a new shaft, and they put it in between the 26th and the 29th of April. It broke again in about a week and I telephoned the Company, and on May 10th, they sent a man out. The extensions came about that time and at the same time they put in a vanadium steel shaft, and on May 17th, the engine was ready for use again. We ran it over to another field and began operating it, but it would not make any better progress than it did before, but we continued to use it until the 28th of May, when I got some disc plows and put them on. Until the extensions were put on it made about a mile and a quarter per hour. The men went away on the afternoon of the 17th, and we continued to operate the machine and its speed was 5½ revolutions of the wheel per minute or a little better than a mile and a quarter on an average.

Q. What was the speed of that engine as it was stated to you in your negotiations?

Objected to as incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Counsel for plaintiff excepted, which said exception was taken and allowed.

A. The engine was told to me to be able to make

(Testimony of J. M. Nelson.)

two miles an hour, plowing with 18 plows, except in the worst places, and then it was supposed to go a mile and three quarters. (The witness continued:) I put on disc plows and attached them to the tractor. Mr. Ferguson drove the engine to the field and said it would not do any better I went the next morning and noticed the action of the machine with the discs on and it **[64—19]** was no better than it was before, so far as I could tell by looking at it. They gave me to understand that the tractor would have plenty and ample power to pull the separator, I having told them the machine would have to travel two miles an hour at least. I told him at that time it would have to do that work. If the separator does not travel that fast or better there is not enough air to carry the chaff out and you get grain and straw together. I have been harvesting for seven years and the least I have ever known a combined harvester to run was two miles an hour, and in the morning it must run faster than that. I so stated to Henry Reuland. Up to the time the disc plows were put on, the 28th of May, the difference in speed was the difference between 5⅖ and 5½ revolutions of the bull wheels per minute. There was no perceptible difference in speed on the ground. I bought the disc plows at an expense of $438.00 after they had told me I should get them. After they were attached Ferguson drove the machine to the field and when he came back he said it didn't do any better. I saw them the next morning and it was no better than before. I went to the house and telephoned Fairbanks,

(Testimony of J. M. Nelson.)

Morse & Company before noon and asked that they send Mr. Reuland to come and see about it, and they said he would. I found his card under my door on the 13th of June. I saw him there in person on Sunday, June 23d. Mr. Reuland was not at my ranch the first week in June, and I never had a conversation with him in which I said that the tractor was a dandy; "You can't get it back if you want it." No such conversation took place at any time. I received a letter dated June 11th from the company reading as follows:

"Los Angeles, Cal. 6/11/12.

Mr. J. M. Nelson, Moreno, California.

Dear Sir: We regret that our Mr. Reuland has not been able to reach you as yet. From a letter we received **[65]** from him this morning we understand he has been spending his time around San Bernardino and Redlands, but as he contemplates spending his time in Perris Valley this week, we hope before you receive this letter, he has visited you. * * * We sincerely hope our Mr. Reuland will be able to suggest a remedy for the magneto, so there will be no further trouble from this source.

Signed—FAIRBANKS-MORSE & COMPANY."

Said letter was introduced in evidence as Defendant's Exhibit "C."

Counsel for defendant requested counsel for plaintiff to produce letters written by defendant to plaintiff on June 4th and 7th, pursuant to a demand for the production of same made in writing before the

(Testimony of J. M. Nelson.)

trial. Counsel for plaintiff stated that he did not have them.

(Witness continued:) On the 4th of June I wrote them and wondered why the engine did not travel faster, thinking it did not get the proper explosion and combustion, or that the trouble was with the magneto. I had telephoned on the 29th of May on the 4th of June I wrote and complained about the engine not making the proper time, and on the 7th of June wrote them again, and the answer was that Mr. Reuland would come, or they hoped he would. This was after I was trying to work the engine with the new discs that they suggested. Up to this time I did everything they suggested, even to the expense of buying $438.00 worth of plows. I wrote this letter dated June 14, 1912, produced by the plaintiff here as follows:

"Moreno, June 14, 1912.

Fairbanks-Morse & Company.

A short time ago I bought three 4-gang disc plows in order to do better plowing and make a lighter draft for the engine, and have looked for your Mr. Reuland to come that he might see it work out. As he failed to make his appearance, and [66] as it will not make the speed required for our work, I have stopped the work, and until it will make two miles an hour, with the load I have been drawing, I am ready to help load it on the cars according to contract. I made no complaint heretofore, as your men assured me that if I only had disc plows the engine would go all O. K. For the first six weeks I was

(Testimony of J. M. Nelson.)

annoyed with breaks and delays. However I could overlook this if the engine would make the time it was claimed to do without making more than 375 revolutions a minute. You know also that it is from two to three tons heavier than claimed to be. To do harvesting successfully the engine must travel two miles or more an hour so that the harvester may handle the grain; and I want the engine for harvesting as well as for plowing.

Yours truly,

J. M. NELSON."

(Witness continued:) It had gone from a mile and a quarter to a mile and a third by actually measuring the revolutions of the wheel. I saw readily that it could not pull a harvester, so I refused to do harvesting jobs. The engine pulls about the same in harvesting as in plowing, that is with 18 plows.

The witness is handed a circular headed, Fairbanks, Morse & Company, 30–60 horse-power oil tractor, and his counsel asked him who gave him the circular.

The witness testified as follows: H. J. Reuland gave me the circular the latter part of February, 1912, when we were negotiating about my purchasing one of these machines. The circular was offered in evidence by counsel for defendant. Objected as irrelevant, incompetent and immaterial and on the ground that these negotiations were had prior to the reducing of the contract in writing.

The COURT.—The objection will be overruled.

[67]

(Testimony of J. M. Nelson.)

Exception taken by plaintiff and allowed.

Counsel for defendant offered the circular in evidence, to which counsel for plaintiff objected, which said objection was overruled, and which ruling is now assigned as error, and an exception was taken by counsel for plaintiff and allowed, and the circular offered in evidence as Defendant's Exhibit "E."

I received a letter from the plaintiff dated June 19th, in reply to my letter of June 14th, and on the 20th of June I wrote to the plaintiff as follows:

"Moreno, June 20, 1912.

Fairbanks-Morse & Company, Los Angeles.

Gentlemen: I have just received your letter of June 19th in answer to mine of the 14th inst., and it is quite apparent to me that your construction of your contract is very different from my understanding of it. I do not find any provision in the contract which required me to return the machine or offer to return it in five days after delivery. I am still willing to meet any one you may send to Allessandro to assist me in loading the engine at that place, and I am willing to pay the freight on it to Los Angeles in accordance with my agreement, but as I understand your letter of the 19th instant this proposition will not be considered by you. If you have changed your mind at this time in regard to the matter, and will so advise me when your men will be at Allessandro, I will be there with the machine and with those necessary to assist in moving it and prepared to pay the freight. Otherwise the machine is subject to your order, and you are welcome to take possession of it

(Testimony of J. M. Nelson.)

at any time. The machine has not proved adequate for my work and does not come up to the representations made to me by your representative at the time of the sale.

Yours very truly,

J. M. NELSON."

Said letter [68] was offered in evidence and marked Defendant's Exhibit "H."

I received a letter July 3d demanding payment of one of my notes, and on July 5th I wrote the plaintiff as follows:

"Moreno, California, July 5, 1912.

Fairbanks-Morse & Company, Los Angeles, Cal.

Gentlemen: Yours of July 3, 1912, just received and contents noted. I refer you to my letter of June 14, 1912, and when this demand is satisfactorily proven by proper test, then I will talk to you in regard to settlement. Your Mr. Reuland came here June 23rd and removed valves, and after two or three days returned and put them in, drew the engine to the field and said he expected to be back the following Friday or Monday with a man to test it; but at this writing I have not heard from him or seen him.

Yours truly,

J. M. NELSON."

This letter was offered in evidence, marked Defendant's Exhibit "J."

Henry Reuland took some valves away from the engine on Monday, June 23d, and the following Wednesday came back and put them in and promised to come back and test that engine satisfactorily to me.

(Testimony of J. M. Nelson.)

He was the last person who came from the company in connection with it, and told me that Fairbanks, Morse & Company were going to make that engine proper.

I had a talk with Reuland prior to signing the contract about a traction engine used in the neighborhood. It was a Caterpillar. It was in the latter part of February.

Q. Did you call his attention to that machine, and what it was doing?

Objected to as incompetent, irrelevant and immaterial, and made prior to the signing of the written contract. [69]

The COURT.—Suppose it should transpire that Reuland, who by the way is an agent of the company, suppose it should transpire that they had in a lawful way changed the terms of the contract, the evidence cannot be excluded as incompetent because the contract might have been legally changed by a competent person.

Moved that the evidence be stricken out unless connected, unless defendant shows that the alleged modification was made by an authorized agent of the plaintiff.

The COURT.—Motion will be denied.

To which ruling counsel for plaintiff excepted, and which ruling is now assigned as error, and said exception being duly taken and allowed.

A. It was a comparison of what his machine would do with what I was acquainted with. I told him that machine went at the rate of 35 acres in half a day,

(Testimony of J. M. Nelson.)

or 70 acres in 24 hours. He said, "If our 30–60 can't plow as much as the Caterpillar, I will give it to you." The Caterpillar is a 60 horse-power machine.

Q. Did you rely on his statements as to what that machine would accomplish?

Objected to as incompetent, irrelevant and immaterial, and a conclusion of the witness.

The COURT.—It is a conclusion of the witness, yet, it is an element of his defense, and the objection is overruled, which ruling is assigned as error and exception was at the time duly taken and allowed.

Counsel for plaintiff enlarged the objection so that it might appear that the testimony was incompetent under the pleadings, which further objection was overruled, and which ruling is now assigned as error and exceptions were taken at the time and allowed. [70]

A. According to what he showed me in the specifications, and the way he represented the machine, I expected the machine to do just what he said.

Moved that the answer be stricken out as not responsive.

The COURT.—Let it go out.

Q. What did you rely on with reference to—what representations?

The COURT.—I am going to allow all that testimony to come in, but defendant is assuming a burden of proof that the contract does not call for, to which ruling counsel for plaintiff excepted at the time, and its exception was allowed.

In my negotiations, I relied upon these representa-

(Testimony of J. M. Nelson.)

tions before signing the contract, the representations that it would do so many acres and travel so fast and do a certain amount of work. I told Reuland that I was purchasing the machine for harvesting also and would have to have a machine which would do two miles or more an hour. I stated to Reuland that I had 1,500 acres to summer fallow. Up to the third of May, I plowed 110 acres with this machine, and, after the 17th of May, I plowed 280 acres, and after I got the disc plows, I plowed 195 acres more, making a total of 585 acres up to June, 1913. I had 200 acres of my own to harvest that season, and had enough to harvest for my neighbors to keep me going until September.

Cross-examination.

The tractor did not travel as Reuland said; it went down in the ground, and couldn't do the work; I would have told Frank Reuland the evening of the 3d of April that I was dissatisfied with the tractor if it hadn't been for the talk about the extensions. He led me to believe that the engine would do the work when the extensions were on. I continued to operate the tractor because they told me to go ahead and do the best I could with it. Frank Reuland said, "Go ahead, [71] and do as much as you can with it; we will get the extensions and put them on." They said they were going to make it what they sold it to be. I got it to do my work, and if I couldn't get it done when I wanted it done, I did the best I could. If it wasn't summer fallowing, it was fall plowing. Their men said if I had the disc plows the engine would

(Testimony of J. M. Nelson.)

do the work. I called the salesman's attention to the road speed given in the circular, and told him I wasn't buying it for road work. Henry Reuland said it would plow two miles in the field on the high speed and a mile and three-quarters on the low speed. I would have told the man to take the machine back if he hadn't said something about the extensions on April 3d. He told me the ground was too wet. The men left contrary to my wishes. I requested that McDearmon be left, but he said he couldn't, and that they would send somebody back when the extensions came. McDearmon and Roy Ferguson might have heard this conversation if the machine wasn't running. Afterwards we had a talk in the presence of McDearmon and Ferguson, and Ferguson said he thought he could run the engine.

After the vanadium steel shaft was put in, I have not had any breakage of the shaft, and the engine has been all right, so far as the shaft is concerned. I knew promptly after repairs were completed on the 17th of May, that the machine did not make any better speed than it had before. I saw that the engine wasn't going any faster than before. I then bought disc plows and got them on in eleven days. You can't do that in five minutes. They were ordered shipped to Alessandro, hauled to my ranch, and erected in eleven days. I ran it from the 28th of May, when I put the disc plows on until the 13th of June, plowing with it all the time. I telephoned them on the 29th that the engine wouldn't do what it was represented to do; that if they could make the engine

(Testimony of J. M. Nelson.)
satisfactory, I wanted it. [72]

Redirect Examination.

I had complained in my telephone message on May 29th, and in the letter of June 4th and June 7th, and on the 14th of June. After the extensions were put on they never made a two-day test of it. I requested it. I took no steps to cancel the contract until the 13th of June, when I wrote a letter of that date.

[Testimony of Frank Dickerson, for Defendant.]

FRANK DICKERSON, a witness for defendant, testified as follows:

I was employed by J. M. Nelson about May 15th last year as night engineer. I saw the engine two or three weeks before that when it was broken down. Afterwards, when I went to get the job, I saw it in operation, and it was going a little better than a mile and a quarter with plows attached. After the extensions were put on, I could see no difference in the speed. We would run to midnight Saturday night and lay over until midnight Sunday in working. Otherwise it would run every night. I tried to run it on the high in the field with the plows lots of times, and it would choke itself down, and drag its power so low that it would miss; it wouldn't drive it through. After the shaft was repaired and the extensions put on by McDearmon, he told me that Nelson wanted him to stay two or three days, but he had lots of work and didn't see any use of staying. After the disc plows were put on there wasn't much difference. Where the disc struck hard ground, and wouldn't cut he got speed up a little, but when it was scratching

(Testimony of Frank Dickerson.)

the ground it wouldn't run very fast. We plowed around a 160-acre field, being less than two miles around, on the low gear and made it in an hour and three-quarters. I couldn't run the machine on the high.

Cross-examination.

I couldn't estimate the acreage we made because every once in a while we would strike a sandy place where we couldn't pull the plow and couldn't [73] pull the engine out, and we would go around those places, and we would cut the acreage down a great deal. A Caterpillar engine would not get stuck in a place like that.

Redirect Examination.

When McDearmon tried to run the machine on the high the engine choked itself down, because we couldn't shift our gears to get it out, and McDearmon had to get in the machine and pry the gears apart so that he could shift it. A combined harvester is pulled by the draw-bar of the engine, and the engine has to travel at least two miles an hour to do the work, and it is better work at two miles and a half.

[Testimony of C. W. Cell, for Defendant.]

C. W. CELL, a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am an implement dealer; have been in the business two years. Have bought and sold farming implements and demonstrated the same. I saw this tractor before the extensions were put on, operating

(Testimony of C. W. Cell.)

with plows in the field, and it was making about a mile and a quarter an hour. I saw it after the extensions were on running without the plows in the ground, and it was making about a mile and three-fifths with the plows jacked up. I saw it with the disc plows attached in operation, and it was making about a mile and a quarter per hour. I have timed combined harvesters in action and any traction engine attached to a harvester must run two miles an hour or better.

Cross-examination.

I sold Mr. Nelson the disc plows that were put on the 28th of May.

Rebuttal Testimony.

[Testimony of Frank Reuland, for Plaintiff (in Rebuttal).]

FRANK REULAND, a witness for plaintiff, testified as follows:

I heard the defendant's testimony in relation to the conversation on the evening of April 3, 1912, in which [74] he stated that I promised to secure for him certain extensions on the bull wheels. I did not make any such a promise. I did not refuse to leave McDearmon on the job, stating that he was needed on a 90 horse-power job somewhere else. I did not state to him that I would have to leave for Los Angeles that night to telegraph for the extensions. I did not promise to have the extensions on his engine ready for use within ten days, because that would be impossible, the factory being located at Beloit, Wis-

(Testimony of Frank Reuland.)

consin. I did not state that there was a car already loaded at Beloit, ready to be shipped; I have no authority from my house to add to the equipment furnished to customers. I did not promise the defendant to return to Los Angeles and endeavor to secure these extensions for him. There was no talk at that time about extensions on the wheels preventing the depressions in the ground. The only talk about extensions was whether they would be any benefit on the sidehills where it was sandy and gravelly. I think Nelson first mentioned it. He asked whether they would be any improvement. I know extensions were put on by my company at the time the vanadium steel shaft was put on, May 17th.

Cross-examination.

Increase of the weight of the engine without increasing power reduces the draw-bar pull 100 pounds for every added ton of weight. The total draw-bar pull of this tractor is 9,000 pounds.

[Testimony of Henry Reuland, for Plaintiff (in Rebuttal).]

HENRY REULAND, called in rebuttal testified as follows:

I was at the defendant's place on the 23d of June, 1912, and replaced certain valves in his engine which had become pitted from neglect and lack of oil, and needed regrinding. After the valves were replaced, the engine worked perfectly. I ran the engine up into the field for him over [75] a mile. It worked perfectly. I told the defendant the engine was all right, and to go ahead and use it. I never repre-

(Testimony of Henry Reuland.)

sented to the defendant at any time that the engine, pulling two or three gang plows of six shares each would make two and a half miles per hour in the high gear, or a mile and three-quarters per hour on the low gear, and never made any representations as to what the engine would do in the field, pulling plows, because it would be impossible for anybody to tell what the slippage would be. I gave him what the catalogue says, and that is all I know about it. I think he told me he wanted to pull a harvester. I had no authority from my house to alter or change or add to any contract previously entered into with customers.

[Testimony of A. B. Cooks, for Plaintiff (in Rebuttal).]

A. B. COOKS, called in rebuttal for plaintiff, testified as follows:

I am an implement dealer and am familiar with a combined harvester and separator, although I have never operated one. I know the mechanism to some extent. The speed of the separator must run about so many revolutions on certain grain to do proper work, and that can be regulated by pulleys on the gears on the cylinder. The pulleys must be made to correspond. I should think that a harvester operating at a speed of one and three-quarters miles per hour could have the gears and pulleys so adjusted as to make the separator operate efficiently.

It would seem to me that if you were going to reduce the speed of your machine your threshing machine is not going the proper speed. I am not fam-

(Testimony of A. B. Cooks.)

iliar with the combined machine. What I am familiar with is a stationary machine, and the regulation I have been speaking of was done on a [76] stationary machine and not on a machine in motion. I am not familiar with a harvester in motion or with the method of regulating a combined harvester in action.

[Testimony of Henry Reuland, for Plaintiff (Recalled in Rebuttal).]

HENRY REULAND, being recalled, testified:

I am the agent who made this sale to the defendant. I never made any representations to him prior to the sale that this engine pulling plows in the field would make a speed of two and one-half miles per hour.

[Testimony of O. L. Stengel, for Plaintiff (in Rebuttal).]

O. L. STENGEL, called on behalf of the plaintiff, testified as follows:

I am assistant to the manager of Fairbanks, Morse & Company. I know that there was a 30–60 tractor sold to Mr. Nelson. I ordered extensions put on this machine somewhere after the 5th of April by request of Henry Reuland.

[Testimony of Frank Reuland, for Plaintiff (in Rebuttal).]

FRANK REULAND, called in rebuttal, testified as follows:

I never made any representations to the defendant as to what the engine would do in the field as to

(Testimony of Frank Reuland.)

speed. Speed was never mentioned. I never demonstrated to the defendant on my automobile head about the width of the extensions, or that the engine would make any better progress with extensions.

There being no further testimony, the case was closed, and counsel proceeded with the argument. [77]

Assignments of Error.

Counsel for plaintiff now assigns the following errors of law:

I.

The Court erred in finding for defendant, because

(a) The evidence produced was insufficient to justify the findings and judgment of the Court.

(b) The findings of the Court are contrary to the evidence and not supported by the testimony.

(c) The judgment is not supported by the findings, and is contrary to the evidence.

(d) The judgment is against the law.

II.

The Court erred in permitting testimony permitting the alteration of a written contract made by the parties, said ruling being contrary to the statutes of the State of California.

III.

The court erred in finding that there was a breach of warranty by plaintiff as to the covenants of the written contract upon which the action was based.

IV.

The Court erred in finding that the plaintiff did

not comply in all respects upon its part with said contract.

V.

The Court erred in finding that plaintiff represented to defendant that the engine could be made adequate by the addition of extensions upon the drive-wheels thereof. [78]

VI.

The Court erred in finding that the plaintiff represented to the defendant that a different kind of a plow was necessary to be used to make the engine adequate for defendant's work.

VII.

The Court erred in finding that plaintiff, by its conduct and representation waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of the engine whether the same complied with his requirements.

VIII.

The Court erred in finding that because of the breach of warranty by plaintiff, the obligation of defendant upon the promissory notes given became null and void.

IX.

The Court erred in rendering judgment against plaintiff and in favor of defendant for costs of suit.

X.

The Court erred in permitting testimony of oral representations prior to the execution and delivery of the written contract.

XI.

The Court erred in permitting testimony of a mod-

ification of the written contract by an agent who had no authority in that behalf.

XII.

The Court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties. [79]

WHEREFORE, because the foregoing evidence and testimony, rulings and exceptions do not appear of record, I, the undersigned, the Judge who tried said action, have, on due notice and after a hearing upon the proposed bill of exceptions and the amendments thereto, settled, allowed and signed this engrossed bill of exceptions to the end that the same may be made a part of the record herein, this 10th day of January, A. D. 1914, and I certify that so much of said testimony as appears herein in the form of question and answer so appears with my consent because I deemed it material that it should so appear.

OLIN WELLBORN,
Judge of the U. S. District Court.

[Endorsed]: 183. At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Engrossed Bill of Exceptions. Filed Jan. 10, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Stutsman & Stutsman 903 California Bldg., 2d and Broadway, Main 3903, A–1543, Attorneys for Plaintiff. [80]

[Plaintiff's Exhibit "A"—Articles of Incorporation of Fairbanks, Morse & Co.]

STATE OF ILLINOIS.
DEPARTMENT OF STATE.
CORNELIUS J. DOYLE, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, CORNELIUS J. DOYLE, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of Articles of Incorporation of Fairbanks, Morse & Co., the original of which is now on file and a matter of record in this office.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the great Seal of State.

Done at the City of Springfield, this 24th day of August, A. D. 1912.

(Seal) C. J. DOYLE,
Secretary of State. **[81]**

State of Illinois,
Cook County,—ss.

We, whose names are hereunto affixed, Charles H. Morse, C. A. Sharpe, and W. E. Miller, propose to form a corporation under an Act of the State of Illinois entitled "An Act concerning corporations" approved April 18th, 1872, and all acts amendatory thereof; and make the following statement as to such proposition:

1. The name of the proposed corporation shall be "Fairbanks, Morse & Co."

2. The object for which the corporation is to be formed is for the purpose of manufacturing and to manufacture scales and all kinds of weighing instruments and apparatus and any and all machines, machinery, tools, instruments and other manufacture made in whole or in part from iron, brass and other metals, and wood and other materials; and for buying and selling the same, and for carrying on such other business as shall be appropriate and necessary in connection therewith or incidental thereto; also to engage in the manufacture, importation, exporting, buying and selling of, and trading in, goods, wares, merchandise and commodities, either upon commission or otherwise; and generally to transact all business necessary or incidental thereto or connected therewith.

3. Its capital stock shall be one million dollars ($1,000,000).

4. The amount of each share shall be one hundred dollars ($100.00).

5. The number of shares of which such stock shall consist shall be ten thousand ($10,000).

6. The location of its principal office shall be in the city of Chicago, in the county of Cook and State of Illinois. **[82]**

7. The duration of the corporation shall be ninety-nine (99) years.

CHARLES H. MORSE. (Seal)
C. A. SHARPE. (Seal)
W. E. MILLER. (Seal)

State of Illinois,
Cook County,—ss.

I, William A. Purcell, a notary public in and for said Cook County, in the State aforesaid, do hereby certify that Charles H. Morse, C. A. Sharpe and W. E. Miller, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 16th day of June, 1891.

[Seal] WILLIAM A. PURCELL,
Notary Public.

FILED
JUNE
17,
1891.
I. N. PEARSON,
Sec'y of State. **[83]**

STATE OF ILLINOIS.
DEPARTMENT OF STATE.
ISAAC N. PEARSON, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETING:

Whereas, It being proposed by the persons hereinafter named to form a corporation under an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations," approved

April 18, 1872, in force July 1, 1872, and the amendments thereto, the object and purposes of which corporation are set forth in a statement duly signed and acknowledged according to law, and this day filed in the office of the Secretary of State.

NOW, THEREFORE, I, ISAAC N. PEARSON, Secretary of State of the State of Illinois, by virtue of the power vested in and the duties imposed upon me by law, do hereby authorize, empower, and license

CHARLES H. MORSE
C. A. SHARPE, and
W. E. MILLER

the persons whose names are signed to the before mentioned statement, as Commissioners to open books for subscription to the Capital stock of said FAIRBANKS, MORSE & CO. such being the name of the proposed corporation, as contained in the statement, at such times and places as the said Commissioners may determine.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 17th [84] day of June, A. D. 1891, and of the Independence of the United States the one hundred and 15th.

(Seal) I. N. PEARSON,
Secretary of State.

TO ISAAC N. PEARSON,
Secretary of State of the State of Illinois:

The Commissioners, duly authorized to open Books of Subscription to the Capital stock of

FAIRBANKS, MORSE & CO.

pursuant to license heretofore issued, bearing date

the 17th day of June, A. D. 1891, do hereby report that they opened books of Subscription to the Capital Stock of said Company, and that the said Stock was fully subscribed; that the following is a true copy of such subscription, viz.:

We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the Capital Stock of

FAIRBANKS, MORSE & CO.

and we severally agree to pay the said Company, for each share, the sum of one hundred Dollars. ($100)

NAME.	SHARES.	AMOUNT.
CHARLES H. MORSE.....	5000	$500,000.00
WM. P. FAIRBANKS.....	4997	499,700.00
C. A. SHARPE.....	1	100.00
EDWARD REITER..... ...	1	100.00
W. E. MILLER..... ...	1	100.00

[85]

That on the twenty-ninth day of June, A. D. 1891, at the office of Fairbanks, Morse & Co., 160 Lake St. Chicago, Illinois, at the hour of 11 o'clock A. M., they convened a meeting of the subscribers aforesaid pursuant to notice required by law, which said notice was deposited in the postoffice *property* addressed to each subscriber, ten days before the time fixed therein, a copy of which said notice is as follows, to wit:

To William P. Fairbanks, Charles H. Morse, C. A. Sharpe, W. E. Miller and Edward Reiter.

You are hereby notified that the Capital Stock of

FAIRBANKS, MORSE & CO.

has been fully subscribed, and that a meeting of the subscribers of such stock will be held at the office of Fairbanks, Morse & Co. 160 Lake Street, Chicago,

Illinois on the 29th day of June, A. D. 1891, at 11 o'clock, A. M. for the purpose of electing a Board of Directors for said Company and for the transaction of such other business as may be deemed necessary:

Signed, CHARLES H. MORSE,
C. A. SHARPE.
W. E. MILLER.

That said subscribers met at the time and place in said notice specified, and proceeded to elect Directors and that the following persons were duly elected for the term of one year, viz.:

CHARLES H. MORSE.
WILLIAM P. FAIRBANKS.
C. A. SHARPE.
EDWARD REITER.
W. E. MILLER.

CHARLES H. MORSE,
C. A. SHARPE,
W. E. MILLER,
Commissioners. [86]

STATE OF ILLINOIS.
DEPARTMENT OF STATE.

ISAAC N. PEARSON, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETING:

Whereas, a Statement, duly signed and acknowledged, has been filed in the office of the Secretary of State, on the 17th day of June, A. D. 1891, for the organization of the

FAIRBANKS, MORSE & CO.

under and in accordance with the provisions of "AN ACT CONCERNING CORPORATIONS," approved

April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached;

And whereas, a LICENSE having been issued to CHARLES H. MORSE, C. A. SHARPE AND W. E. MILLER, as Commissioners to open books for subscription to the Capital Stock of said Company:

And Whereas, the said Commissioners have, on the 30th day of June, A. D. 1891, filed in the office of the Secretary of State a report of their proceedings under the said License, a copy of which report is hereunto attached.

NOW, THEREFORE, I, ISAAC N. PEARSON, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said

FAIRBANKS, MORSE & CO. is a legally organized corporation under the laws of this State.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 30th day of June, A. D. 1891, and [87] of the Independence of the United States the one hundred and 15th.

[Seal] I. N. PEARSON,
Secretary of State.

State of Illinois,
County of Cook,—ss.

I, FRANK M. BOUGHEY, do hereby certify that I am Secretary of Fairbanks, Morse & Co., a Corporation duly organized under the laws of the State of Illinois, and that as such Secretary I have charge and custody of all the incorporation papers of said Fair-

banks, Morse & Co., and of its original charter, and I further certify as such Secretary that the foregoing Articles of Incorporation of Fairbanks, Morse & Company, certified by the Secretary of State of the State of Illinois, are true copies of the Articles of Incorporation and Charter of said Fairbanks, Morse & Co., in my custody as such Secretary, including copy of the application for license, copy of license issued by the Secretary of State of the State of Illinois, on June 17, 1891, to receive subscriptions to the capital stock, copy of the report of the Commissioners as licensed to receive subscriptions to the capital stock of the Company and a copy of the charter of said Fairbanks, Morse & Co., issued on the 30th day of June, 1891, and I further certify that said Articles of Incorporation, of which the foregoing are true copies, are in entire accordance with the laws of the State of Illinois, and that the foregoing Articles of Incorporation constitute the charter of said Fairbanks, Morse & Co., a corporation.

WITNESS my hand and seal of said Fairbanks, Morse & Co., at Chicago, Illinois, this 6th day of March, A. D. 1913.

[Seal] F. M. BOUGHEY,
Secretary.

[Endorsed]: 183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plaintiff's Exhibit "A." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. **[88]**

[Plaintiff's Exhibit "B"—Contract, Dated March 29, 1912, Fairbanks, Morse & Co.—J. M. Nelson.]

FAIRBANKS-MORSE GAS AND GASOLINE ENGINES.

Los Angeles, Cal., Mar. 25, 1912. *19*

Mr. J. M. Nelson,

Moreno, Cal.

Dear Sir:—

We hereby propose to furnish one 60 H. P. (actual) Fairbanks-Morse Oil Tractor, F. O. B. Alessandro, Cal.

This engine has been tested at our factory at Beloit, Wis., with a break test and "Fairbanks" scale and over 60 actual horse-power developed.

With this engine we furnish one ..... pulley; one galvanized steel supply tank, with necessary pipe and fittings to connect tank; exhaust pipe and fittings; one electric ignitor and battery; necessary wrenches and oil can; and with each Fairbanks, Morse horizontal engine, over 8 H. P., we furnish our ~~Patent Self-Starting Device.~~

The bearings of this engine are of ~~brass and phosphor bronze,~~ and the crank shaft and connecting rod of forged steel. The valves are water jacketed.

We guarantee this engine and all other machinery furnished hereunder to be made of good material and in a workmanlike manner, and if any part of said engine or machinery shows defective material or workmanship within one year, we agree to furnish a new

part free of cost to replace such defective part, but we assume no liability for, nor will we be responsible for damages or delays caused by such defective material or workmanship, nor will we make any allowance for repairs or alterations made by others, unless same are made with our written consent.

With the above engine we also propose to furnish: Above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine we agree to furnish a competent man for 2 days within 10 days of **[89]** receipt of engine at Alessandro. This man to operate and demonstrate the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not. If you find engine is not sufficient for your needs, you agree to give our men all necessary assistance loading the engine at Alessandro, pay freight on same to Los Angeles, and this contract becomes void.

The price of above machinery is $3600.00 Thirty Six Hundred .....Dollars, payable in gold coin at the office of Fairbanks, Morse & Company, Los Angeles, California, which sum said J. M. Nelson agrees and promises to pay as follows:

$1200.00 cash on or before June 25, 1912
1200.00 " " " " Mar. 25, 1913
1200.00 " " " " Mar. 25, 1914

Notes to S. J. L. 3/25/12. (m)

All deferred payments to be evidenced by promissory notes dated Mar. 25, 1912, bearing seven per cent interest per annum and if each and every payment is not made when due as above provided, then

the entire amount, together with interest, shall immediately become due and payable at our option. You agree to pay all attorneys' fees and expenses incurred by us in the collection thereof, whether suit is filed or not.

The title and right of possession to the property furnished under this agreement shall remain in Fairbanks, Morse & Company until all payments hereunder (including deferred payments and any notes, judgments or renewals thereof, if any) shall have been fully made in U. S. gold coin and the machinery and equipment herein described shall remain the personal property of Fairbanks, Morse & Company, whatever may be its mode of attachment to realty or otherwise, until fully paid for in U. S. gold coin and upon failure to make payments (or any **[90]** of them) as herein provided, we may retain any and all payments which may have been made as liquidated damages and may deny the use of said property or any part thereof and be free to enter the premises where said machinery or equipment may be located, and to remove the same as our property without process of law and without prejudice to any further claims on account of damages which we may suffer from any cause, and we shall not be liable in any action at law or in equity for removing our property hereunder.

It is agreed that upon acceptance of this proposal we will make delivery of above machinery without unnecessary delays, and that the purchaser will receive the property herein specified in accordance with the terms of this contract, and shall become respon-

sible therefor after its delivery at the point designated herein. The purchaser also agrees to make good any loss to Fairbanks-Morse & Company occasioned by fire or any other cause after delivery at the point designated herein, and until the full amount herein agreed upon has been paid.

It is understood that we shall not be held responsible for any delay in delivery or loss occasioned thereby which shall be caused by fire, strikes, non-receipt of material required, delays in transit, or any other cause beyond our control; also that the acceptance of apparatus by purchaser shall constitute a waiver of all claims for damages or loss occasioned by any delay which may have occurred.

Cancellation of this contract may be accepted by us under conditions satisfactory to us, in which case Purchaser agrees to pay not less than twenty per cent of contract price.

It is understood that this contract is the only one existing between the parties hereto, and that all communications or [91] understandings, either verbal or written, contrary to this proposal and specifications, are hereby withdrawn and annulled.

This contract is subject to the written approval of the Agent of Fairbanks, Morse & Company at Los Angeles, California, and when so approved shall im-

mediately become binding on all parties hereto.

Respectfully submitted,
FAIRBANKS, MORSE & CO.
By H. J. REULAND.
Approved: C. KNAGENHELM.

Accepted:
J. M. NELSON.

References:
O. K.—MEYER
DILLE.

[Endorsed]: Contract. No. With J. M. Nelson. Moreno. Engine No. 60 HP. Tractor. Price, $3,600.00.
Date 3/25/12
Shipped.....
.....
.....
Payable.....
.....
Sold by.....
Erected by.....
(m)

183—Civil. Fairbanks, Morse & C. vs. J. M. Nelson. Plff's. Exhibit "B." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [92]

[Plaintiff's Exhibit "C"—Note of J. M. Nelson, Dated March 25, 1912.]

19476.

$1200.00. No. 1825.

Los Angeles, Calif. Mar. 25, 1912.

Ninety Days after date for value received, I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order, at Citizens' National

Fairbanks Standard Scales

Wind Mill World. Eclipse Trade Mark 6/23/12

Bank, Los Angeles, Cal., Twelve Hundred Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

Address—Moreno, Cal.

Redlands. J. M. NELSON.

[Endorsed]: 2164. Pay to the Order of the Citizens' National Bank of Los Angeles, Fairbanks, Morse, & Co. Pay to the Order of any Bank or Banker. The Citizens' National Bank of Los Angeles, Cal., Collection Department. E. T. Pettigrew, Cashier. 183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plff's. Exhibit "C." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [93]

[Plaintiff's Exhibit "D"—Note of J. M. Nelson, Dated March 25, 1912.]

$1200.00. No. 1826.

Los Angeles, Calif. Mch. 25, 1912.

Fairbanks Standard Scales

One year after date for value received, I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order, at Citizens' National Bank, Los Angeles, Cal., Twelve Hundred

Wind Mill World. Eclipse Trade Mark

Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States. 24686.

Address—Moreno, Cal.

J. M. NELSON.

[Endorsed]: 2164. Pay to the Order of the Citizens' National Bank of Los Angeles. Fairbanks, Morse & Co.

~~Pay to the Order of~~
~~ANY BANK OR BANKER,~~
~~The Citizens' National Bank~~
~~Collection Department,~~
~~E. T. PETTIGREW, Cashier.~~
.....ERASED.....
.....

183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plff's. Exhibit "D." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [94]

[Plaintiff's Exhibit "E"—Note of J. M. Nelson, Dated March 25, 1912.]

$1200.00. No. 1827.

Los Angeles, Calif. Mar. 25, 1912.

Two years after date for value received, I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order, at Citizens' National Bank, Los Angeles, Cal., Twelve Hundred Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

Fairbanks Standard Scales

Eclipse Trade Mark

Wind Mill World.

Address—Moreno, Cal.

J. M. NELSON.

[Endorsed]: 183—Civil. Fairbanks, Morse & Co. vs. J. M. Nelson. Plff's. Exhibit "E." Filed Mar. 19, 1913. W. M. Van Dyke, Clerk. [95]

[Notice of and Motion for a New Trial.]

In the District Court of the United States, Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

NOTICE OF MOTION FOR A NEW TRIAL.

To the Above-named Defendant, and to Messrs. Collier and Craig, Attorneys for Defendant:

YOU, AND EACH OF YOU, will please take notice that the plaintiff in the above-entitled cause will move the Court, at the courtroom in the Federal Building, in Los Angeles, California, to set aside and vacate the findings and judgment rendered in the above-entitled cause, and to grant to plaintiff a new trial thereof, upon the following grounds, to wit:

First: Because the evidence produced upon the trial was insufficient to justify the findings and judgment of the Court, and not sufficient to support the same.

Second: Because the findings of the Court are contrary to the evidence, and not supported by the testimony.

Third: Because the judgment is not supported by the findings, and is contrary to the evidence.

Fourth: Because the judgment is against the law.

Fifth: Because the Court erred in the admission

of certain testimony over the objections of the plaintiff.

Sixth: Because the Court erred in rejecting certain testimony offered by the plaintiff. [96]

Seventh: Because the Court erred in certain rulings upon the objections of counsel for plaintiff.

Eighth: Because the Court erred in admitting testimony over the objections of plaintiff, permitting the alteration or reformation of a written contract entered into by the parties hereto contrary to the statute of the State of California, and the law, as therein defined.

Ninth: Because the Court erred in finding that there was a breach of warranty by the plaintiff as to the covenants and conditions contained in the written contract entered into between plaintiff and defendant, upon which this action was based.

Tenth: Because the Court erred in finding that the plaintiff herein did not comply in all respects upon its part with the said written contract.

Eleventh: Because the Court erred in finding that the plaintiff represented to the defendant that the engine in suit could be made adequate for defendant's work by the addition of extensions upon the drive-wheels of the said engine.

Twelfth: Because the Court erred in finding that the plaintiff represented to the defendant that a different kind of a plow was necessary to be used with said engine to make the same adequate for defendant's work.

Thirteenth: Because the Court erred in finding that said engine when used in connection with said

different kind of plows, was not adequate for the defendant's work.

Fourteenth: Because the Court erred in finding that the plaintiff, by its conduct and representations, waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of said engine whether the same complied with his requirements.

Fifteenth: Because the Court erred in finding that the defendant notified the plaintiff to furnish a man to properly [97] test and demonstrate said engine after said extensions were furnished and said different plows were used by defendant.

Sixteenth: Because the Court erred in finding that because of the breach of warranty by plaintiff the obligation of defendant upon the promissory notes given under said contract, became null and void.

Seventeenth: Because the Court erred in rendering judgment against plaintiff and in favor of defendant for his costs herein expended.

The said motion will be made upon the minutes of the Court, including the notes of the evidence taken down by the reporter, and upon the pleadings, papers and files of said cause, and upon all the rulings made by the Court and excepted to by the plaintiff, and will be brought on for argument on Monday, October 6th, 1913.

Dated September 30th, 1913.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

[Endorsed]: No. 183—Civil. In the District Court United States, Southern District California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Notice of Motion to Move for a New Trial. Filed Oct. 2, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Rec'd Copy October 1st, 1913. Collier & Craig, Attorneys for Defendant. Stutsman and Stutsman, 903 California Bldg., Attorneys for Plaintiff. [98]

[Additional Ground of Motion for New Trial and Stipulation Relative Thereto.]

In the District Court of the United States, Southern District of California, Southern Division.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Now comes the plaintiff in the above-entitled cause, and with leave of Court first had and obtained, and upon stipulation with counsel for defendant, adds the following ground to its Notice of Motion for New Trial, to wit:

XVIII.

Eighteen: Because the Court erred in permitting the introduction of oral testimony to alter or modify

the terms of the written contract entered into by the parties hereto.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

It is hereby agreed that the above additional ground to plaintiff's Notice of Motion for a New Trial may be filed herein and presented with the other grounds to the said Court upon the argument of counsel, waiving notice and time.

COLLIER & CRAIG,
Attorneys for Defendant.

Dated Oct. 20, 1913.

[Endorsed]: No. 183—Civil. In the District Court of the United States, Southern District of California, Southern Division. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Additional Ground of Motion for New Trial and Stipulation. Filed Oct. 23, 1913. Wm. M. Van Dyke, Clerk. [99] By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Building, Second and Broadway, Los Angeles, Cal. Phones: Home A–1543 Sunset: Main 3903, Attorneys for Plaintiff. [100]

[Order of October 6, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on

Monday, the sixth day of October, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard under and pursuant to plaintiff's motion for a new trial therein; now, it appearing that the parties hereto, by their counsel, have consented thereto, it is ordered that said cause be, and the same hereby is continued until Monday, the 20th day of October, 1913, at 10:30 o'clock A. M., for said hearing. [101]

[Order of October 20, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twentieth day of October, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; A. H. Stutsman, Esq., appearing as counsel for plaintiff; Wm. Collier, Esq., appearing as counsel for defendant; now, on motion of Wm. Collier, Esq., of counsel for defendant, and by consent, it is ordered that said cause be, and the same hereby is continued until Monday, the 3d day of November, 1913, at 10:30 o'clock A. M., for said hearing. [102]

[Order of November 3, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the third day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; Carl A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; now, good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock, P. M., of this day for said hearing. **[103]**

[Order of November 3, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the third day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on at this time to be heard on plaintiff's motion for a new trial thereof; Carl A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; now, good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued until Monday, the 17th day of November, 1913, at 10:30 o'clock A. M., for said hearing. [104]

[Order Denying Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the seventeenth day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; C. A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; and said motion having been argued in support thereof, by C. A. Stutsman, Esq., of counsel for plaintiff; and said cause having been submitted to the Court for its consideration and decision on said motion, and the oral argument thereof; it is by the Court ordered that plaintiff's motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of plaintiff and by direction of the Court, exceptions are hereby noted herein on behalf of said plaintiff. [105]

[Petition for, and Order Allowing Writ of Error and Fixing Amount of Bond.]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Hon. OLIN WELLBORN, Judge of the District Court Aforesaid:

Now comes Fairbanks, Morse & Company, a corporation, plaintiff in the above-entitled cause, by Stutsman & Stutsman, its attorneys, and respectfully shows that on the 2d day of September, A. D. 1913, the Court directed findings and a judgment against your petitioner, and in favor of J. M. Nelson, defendant, and upon said findings, a final judgment was entered on the 22d day of September, A. D. 1913, against your petitioner, plaintiff in said cause.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon, as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a Writ of Error do issue; that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, [106] sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an Order fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such Bond as may be required, that all further proceedings may be suspended until the determination of said Writ of Error

by the Circuit Court of Appeals.

STUTSMAN & STUTSMAN,
Attorneys for Petitioner in Error.

"Writ of Error granted, this, the 28th day of January, A. D. 1914. Bond fixed at $300.00."

OLIN WELLBORN,
Judge of the U. S. District Court.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Petition for Writ of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Building, Attorneys for Plaintiff. [107]

[Bond on Writ of Error.]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

WRIT OF ERROR BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Fairbanks, Morse & Co., a corp., and Na-

tional Surety Co. of New York, as sureties, are held and firmly bound unto J. M. Nelson, in the full and just sum of Three Hundred ($300.00) Dollars, to be paid to the said J. M. Nelson, his administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, by these presents:

Signed and dated, this, the 28 day of January A. D. 1914.

Whereas, lately, at a regular term of the District Court of the United States for the Southern District of California, Southern Division, sitting at Los Angeles, in said District, in the suit pending in said court between Fairbanks, Morse & Company, a Corporation, as plaintiff, and J. M. Nelson, as defendant, cause No. 183, on the law docket of said court, final judgment was rendered against the said Fairbanks, Morse & Company, plaintiff, that plaintiff take nothing by said [108] action, and that defendant recover from plaintiff its costs therein expended in the sum of $140.40, and the said Fairbanks, Morse & Company, a corporation, plaintiff, has obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court, in the aforesaid suit, and a citation directed to the said J. M. Nelson, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Fairbanks, Morse & Company, a corporation, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FAIRBANKS, MORSE & CO., a Corporation, [Seal]
By C. KNAGENHELM, Agt. [Seal]
NATIONAL SURETY COMPANY. [Seal]
By CATESBY C. THOM,
Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 28th day of January, in the year one thousand nine hundred and fourteen, before me, William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed [109] to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal] WILLIAM M. CURRAN,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Writ of Error Bond. Approved Jany. 28, 1914. Olin Wellborn, U. S. District Judge. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Bldg., 2d and Broadway, Main 3903, A–1543, Attorneys for Plaintiff. **[110]**

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Assignments of Error.

Now comes Fairbanks, Morse & Company, a corporation, plaintiff in the above-entitled cause, and plaintiff in error herein, and in connection with its petition for a Writ of Error in this cause, assigns the

following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record.

1. The Court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties upon the ground that a written contract may not be altered, except by another written contract or an executed oral agreement, and the following is the full substance of the said evidence so admitted over objection of plaintiff.

Defendant Nelson testified the bull wheels of the tractor made deep impressions on the land because the ground was wet; that he called Reuland's attention to it, and he said that could be overcome by puting extensions on, and that he would get the weights. That on the evening of the **[111]** third day he talked with Reuland, who said he was going to leave and had to get home in order to telegraph to the factory where these extensions were made to get them on a car being loaded so that they could be gotten out here without any delay. There was nothing said about my accepting the machine. The extensions came. I never ordered them. McDearmon put them on. Before leaving on the evening of the third day Reuland measured on his automobile head the width of the extensions, stating it would give the wheels so much more bearing on the ground and more tractive power so the engine could make better progress. He said the extensions would be here in about ten days. They came on May 11th.

2. The Court erred in the admission of the testi-

mony set forth in the first assignment above, over the objections of plaintiff, which testimony was offered as a waiver of the five-day limitation provided in the contract on the ground that the effect thereof was to alter and modify the terms of the said written contract.

3. The Court erred in permitting the introduction of oral testimony and written evidence as to representations made prior to the execution and delivery of the written contract upon the ground that the same superseded all prior negotiations and no evidence other than the contents thereof was permissible or lawful, and the full substance of the said evidence erroneously admitted over objection of plaintiff is as follows:

Defendant Nelson identified a printed circular introduced as Defendant's Exhibit "A," as being a document used prior to the contract in the negotiations for the sale to him of the tractor and stated that it was represented to him that the tractor was able to make two miles an hour, **[112]** plowing with 18 plows, except in bad places, where it would make a mile and three-quarters. That the circular was given to him by Reuland the latter part of February, 1912, when we were negotiating.

The Court erred in overruling the objections of plaintiff to the introduction of all of the above testimony and evidence.

4. The Court erred in permitting the introduction of oral testimony as to representations made to defendant prior to the execution of the written contract, upon the ground that prior representations be-

came merged in said written contract, which in the absence of fraud, accident or mistake is conclusive as to the agreement of the parties, and the following is the full substance of the evidence so erroneously admitted over the objections of plaintiff.

Defendant Nelson testified that he had a talk with Reuland prior to signing the contract about a traction engine of another make used in the neighborhood, which talk occurred the latter part of February. That he called Reuland's attention to the other machine and what it would do; that it went at the rate of 35 acres in a half a day, or 70 acres in 24 hours, to which Reuland stated that if his tractor could not plow as much as that machine, he would give it to him. That he (Nelson) relied upon the statements of Reuland as to what Reuland's machine would accomplish and expected the machine to do so many acres and travel so fast and do a certain amount of work.

5. The Court erred in permitting the introduction of testimony showing the modification of the written contract by an agent who had no authority in that behalf, upon the ground that the principal is not bound by the acts of his agent [113] beyond the scope of his authority, and the full substance of the evidence so erroneously admitted over objections of plaintiff is as follows:

The defendant Nelson testified that Reuland stated that it would be necessary to leave on the evening of the third day in order to get home to telegraph to the factory to get the extensions for the bull wheels without any delay, which he was to get in about ten

days and promised to secure them for him, the defendant. That the defendant was told to go ahead and do the best he could with the machine until the extensions got there and operated the tractor for about twenty minutes after the men left that night when it broke down and on the 16th of April, after it was repaired used it again until the 19th, when it again broke down and after being repaired on May 17th, again used it.

6. The Court erred in overruling the objections of plaintiff to the introduction of the above testimony, and all of the same upon the ground that the introduction thereof was not followed by proof establishing the authority of the agent in that behalf.

7. The Court erred in its special finding that plaintiff, by its conduct and representations, waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of the engine whether the same complied with its requirements upon the ground that proof of such waiver being oral and not executed could not modify the written contract made by the parties.

8. The Court erred in finding that the plaintiff did not comply in all respects upon its part with said contract because the admitted testimony showed that plaintiff furnished and delivered to defendant the tractor required under the contract. [114]

9. The Court erred in its special finding that there was a breach of warranty by plaintiff as to the covenants of the written contract upon which the action was based, because plaintiff did not warrant the said tractor to the defendant in any respect except to re-

place defective parts within one year.

10. The Court erred in its special finding of the ultimate fact that there was a breach of warranty by plaintiff because the facts proven were not sufficient to sustain the judgment, and the testimony offered does not support the same.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed and a new trial thereof ordered.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff in Error.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Assignments of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Bldg., 2d and Broadway, Main 3903, A–1543, Attorneys for Plaintiff. [115]

Praecipe [for Transcript of Record].

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,
Defendant.

To the Clerk of Said Court:

Sir: Please issue Transcript in above cause, of following described pleadings, papers, exhibits, etc.;

Plaintiff's Complaint, Exhibit attached and Amended to Complaint.

Plaintiff's Exhibits "A," "B," "C," "D," and "E."

Writ of Subpoena served on defendant and return thereon.

Defendant's Answer.

Findings of Fact and Conclusions of Law.

Judgment.

Written Opinion of the Court.

Notice of Motion for New Trial and Amendment Thereto.

Orders Extending Time for Hearing Thereof.

Ruling of Court upon Motion for New Trial.

Engrossed Bill of Exceptions.

Petition for Writ of Error and Allowance Thereof.

Assignment of Errors.

Writ of Error. Bond and Approval Thereof.

The Writ of Error, Allowance and Certificate of Clerk.

Citation in Error.

Clerk's Certificate.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

[Endorsed]: No. 183–Civil. U. S. District Court, Southern [116] District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Praecipe for Transcript. Filed Jan. 31, 1914. Wm.

M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [117]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and seventeen (117) typewritten pages, numbered from 1 to 117, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment was made and entered in said cause, and also of the Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error and Bond on Writ of Error, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the Praecipe filed in my office, on behalf of the plaintiff, by its attorneys of record;

I do further certify that the cost of the foregoing record is $58 85/100, the amount whereof has been [118] paid me by the Fairbanks, Morse & Company, a corporation, the plaintiff in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 11th day of February, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-eighth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States, in and for the Southern District of California.
[119]

[Endorsed]: No. 2379. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Company, a Corporation, Plaintiff in Error, vs. J. M. Nelson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed February 16, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Fairbanks, Morse & Company, a corporation,
Plaintiff in Error,
vs.
J. M. Nelson,
Defendant in Error.

OPENING BRIEF.

POINTS AND AUTHORITIES.

This is an action at law, based upon diversity of citiship. Plaintiff in error, an Illinois corporation, made a written contract with defendant in error, a citizen of California, by the terms of which defendant in error purchased a tractor, in payment of which he executed and delivered his three promissory notes for twelve hundred dollars ($1200) each to plaintiff in error. Failing to pay the notes, this action was commenced. Upon the trial in the lower court the execution of the contract and of the promissory notes were admitted. The proof that plaintiff in error is and was a foreign corporation was not controverted, and the delivery of the tractor to defendant in error upon his ranch was admitted in the pleadings, and the affirmative defense presented by the

answer that the contract did not truly express the agreement of the parties and that there was a mutual mistake, was abandoned upon the trial. The only issues presented, therefore, were those involved in certain affirmative defenses presented by the answer, and the questions of law now proposed upon this appeal grow out of the rulings of the trial court upon the admission or rejection of testimony, oral and documentary, upon these defenses, and the error of law in the special finding that plaintiff in error waived the provision of the written contract requiring defendant in error to accept or refuse the tractor not later than five days from the first demonstration thereof.

Confining this argument to the assignments of error presented by the record and in the order in which the assignments are made, it is claimed in the first assignment [page 111 original certified record, page 113, Transcript] that the court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties. The contract required plaintiff in error to furnish a competent man for two days to demonstrate the tractor for defendant in error, who was to decide on or before the fifth day whether it fulfilled his requirements [original record, page 89, page 91, Transcript]. Notwithstanding this provision of the contract, the court permitted the defendant in error to testify that during the demonstration the wheels of the tractor sank into the ground to such an extent as to prevent a successful operation, and that the agent of plaintiff in error, to overcome this difficulty, promised to secure and furnish certain extensions

to be put upon the wheels, permitting them to offer a greater surface and prevent the sinking into the ground, and to that end left prior to the expiration of the fifth day for the purpose of securing them. The purpose of this testimony was to excuse a compliance by defendant in error with the obligation in his written contract to accept or reject the tractor on or before the fifth day. He was further permitted to testify that the extensions were in fact subsequently and after the expiration of the fifth day, put on, and it is insisted that this conduct of plaintiff in error amounted to a waiver of its right to insist on a decision by the fifth day. The law governing the rights of both parties upon this question is fixed by the provisions of section 1698, Civil Code of California, which is as follows:

A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.

Since it is not claimed, nor was it proven, that the "decision on the fifth day" clause of the written contract was waived by a written agreement or that plaintiff in error agreed in writing to procure and furnish the extensions for the wheels, we are only concerned to inquire whether there was any oral agreement by plaintiff in error whatever, whether implied by unspoken conduct, amounting to a waiver, or otherwise, amounting in effect to a modification or alteration of the written contract, and to inquire whether, if there was such oral agreement, conduct or waiver, it became and was executed at any time prior to the expiration of the fifth day, provided in the written contract. Unless such oral agreement was executed, it could not modify the

written contract. So long as it remained executory, the rights of the parties must be measured by their written agreement. This must be so if the provisions of section 1698, Civil Code, mean anything. Prior to March 30, 1874, this section of our law contained the clause "except as to the time of performance which may be extended by any form of agreement," which were the closing words of the section. The legislature, on this date, amended the section by striking out this last clause and leaving it as we have quoted it above. It was the evident purpose of the legislature to make it impossible for the parties to a written contract to alter or vary the same, even as to the time of performance, unless that alteration be effected by another contract in writing, or by an executed oral agreement. It should be remembered that the waiver insisted upon by defendant in error in this case relates only to the time of the performance of a certain act under the contract, namely, the decision by him on or before five days as to whether the engine was adequate for his purposes. The contract in the case at bar specifically and in writing required him to decide on or before the fifth day. He contends that this time was extended by the conduct of the plaintiff in error in agreeing to put on certain extensions which were in fact not put on until the 17th day of May. In other words, that at the time of the performance by him of this act, namely, the decision as to whether the engine was adequate for his purposes, was extended by the parties themselves. In the contract the defendant in error was required to perform a certain act within a certain given time. His counsel claimed that this time was extended by the

acts and conduct of the plaintiff in error, and they relied upon the doctrine of waiver pronounced in Knarston v. Manhattan Life Insurance Co., 140 Cal. 57. The trial court found [finding No. 7, bottom page 31, Transcript] that the "decision on the fifth day" clause in the written contract was waived by plaintiff in error by its conduct and representations and specifically adopted the doctrine in the Knarston case as decisive of the case at bar. [See conclusions of the court, page 38 of Transcript; also page 43 of original certified record.] Having decided the case at bar by the principle announced in the Knarston case, we believe the trial court erred, and we will attempt, briefly as possible, to differentiate the two cases.

The Knarston case was an action brought to recover upon a policy of life insurance, which policy contained the usual forfeiture clause, and the defense was that the policy had become forfeited prior to the death of the assured by his failure to make payment of the semi-annual premium provided for therein. This payment became due November 15, 1895, and the general manager of the company endeavored to collect this premium but failed, and subsequently the assured secured from the officers of the company two separate extensions of time within which to make the payment, and before the expiration of the second extension the assured was killed in a railroad accident. The Supreme Court held that the extensions of time for the payment of the annual premium might be proved by parol evidence, and that the effect of such evidence is not to vary the terms of the written contract of insurance, which contained no agreement to pay the premium, but

only a condition for its payment which the company or its agents were competent to waive. The distinction between the Knarston case and the case at bar is this: In the Knarston case the written contract contained no obligation which required the assured to perform any specific act, whereas in the case at bar the written contract specifically required the defendant in error to perform an affirmative act, to-wit: to decide on or before the fifth day whether the engine complied with his requirements. The Supreme Court says that in a contract for insurance there is no written promise on the part of the assured to pay the premiums as they fell due. That the legal effect of the contract by the company was that if the assured paid the premiums promptly as they matured, that the contract should continue in force. In other words, that it was possible for one of the parties to the contract to terminate the same by a failure to comply with the contract upon his part. In this respect contracts of life insurance should be distinguished from other written contracts, and particularly from the written contract in the case at bar. We ask the court to read the opinion of the Supreme Court as found upon page 62 of this report, in which the Supreme Court makes use of the following language: "In a contract of insurance, such as is involved here, there are no stipulations in the policy whereby the insured agrees to do anything. He does not agree to make any payments; is not liable upon the policy for any payments, and no action for any purpose can be maintained thereon against him. The agreement is solely one on the part of the company. That if payments are made at a given time by the insured, the con-

tract of insurance originally entered into will, on its part, be continued, with a provision therein that upon failure to make payment at the given date the policy will be void."

The court further says: "This latter provision, however, is one common to insurance policies, solely in favor of the company, and being so in its favor may be waived. This waiver is not an alteration of the terms of the contract. The contract continues in force by the election of the company not to avail itself of the reserved right of forfeiture." There is a clear distinction to be drawn between the Knarston case and the case at bar, because in the case at bar there was an agreement by defendant to do an affirmative act. It would be idle for counsel for defendant in error to contend that it is possible for him to refuse to be bound by the contract, and thus escape its liability. It would be idle for them to contend that because of the alleged waiver of plaintiff in error it was possible for the defendant in error to refuse to decide on or before the fifth day whether the engine complied with his needs, and therefore by so doing leave the decision forever open and claim that because he had not yet decided he could not be compelled to pay for the engine. In other words, in the contract in the case at bar, if the defendant in error would accept the benefit arising from his contract, he must also assume the responsibility.

The trial court, in its written conclusions [page 43 original certified record, page 38, Transcript], speaks of the "five days" clause as a limitation, and says: "This limitation, had it been effectual, would have forfeited a valuable right of the defendant, and was solely

for the benefit of the plaintiff," forgetting that while it was a right, it was also a duty. The court labored under the impression that the contract was so drawn as to give defendant in error the option to accept or reject at any time, whereas, it was obligatory upon him to decide not later than five days. "On or before the fifth day, you agree to decide";—these are the words of the contract. We believe the trial court erred in holding that section 1698 Civil Code and the case of Hennehan v. Hart, 127 Cal. 656, were inapplicable.

The Supreme Court of California decided in this case that the time for the payment of a promissory note past due cannot be extended for a definite period so as to bind the payee by an unexecuted oral agreement that the maker shall pay the interest monthly according to the terms of the note, for such period. In the decision of the court in this case the following significant language is used:

"It is difficult to conceive how an oral agreement extending the time in which a written agreement is to be performed can be executed until the time has elapsed, and then the question could not arise. If the period of time mentioned in the oral agreement has not elapsed, then the agreement has not been executed." (Citing certain cases.)

In other words, the oral agreement to put on the extensions did not lapse until May 17th, and it was impossible for an oral agreement to do anything on May 17th, to become executed at any time previous to that date, and certainly not before the expiration of April 5th, which was the day the contract required defendant in error to decide. The court further says:

"Counsel for appellant cites Waugenheim v. Graham, 39 Cal. 175, to the effect that the time for the performance of a contract in writing may be extended by parol. The case was decided in April, 1870," previous to the adoption of the codes, and at a time when section 1698 contained this clause, "except as to the time of performance which may be extended by any form of agreement." This section was amended March 30, 1874, by dropping the quoted clause, and after the amendment went into effect, July 1, 1874, the section has continued as at present. We think the amendment was a necessary and wise one. It prevents the solemn written contract which the parties have made certain from being tampered with, annulled, set aside, or extended by the oral evidence of interested parties. The section as amended lays down a valuable and salutary rule in regard to written instruments. It prevents parties who have made a promissory note, after it has become due according to the time written therein, from making the defense that it is not due by reason of a parol promise to extend the time, which promise would depend upon the credibility of interested witnesses." This case is authority for the rule that an oral agreement extending the time within which a condition precedent is to be performed cannot become executed until the time itself has lapsed. In other words, that the pretended oral agreement entered into between the plaintiff and the defendant in error in this case, by which the plaintiff in error obligated itself to put on the extensions upon the bull wheels, did not become executed until at least the 17th day of May, which was the time when these extensions were in fact put on. The

17th day of May was long past the fifth day upon which the defendant was to decide, and therefore it was not possible for the oral agreement which the defendant claimed was entered into prior to the expiration of the fifth day to have been an executed oral agreement. Another case decided by the Supreme Court of California, and interpreting section 1698 of the Civil Code, is the case of Platt v. Butcher, 122 Cal. 634.

This was an action by a real estate broker to recover commissions upon the sale of real estate. The contract of employment was in writing, and by its terms was to remain in full force and effect until September 1, 1885. A short time prior to that date by parol agreement, the time for performance was extended, and during such extension of time the broker found a purchaser for the land and a sale was made.

In the decision the court makes use of the following language:

"The parol agreement in this case was a covenant to extend the time for the performance of a certain contract. If that covenant be construed as one in effect covering all the terms of the original written contract, then it was not an alteration or variation of that contract, but the creation of a new one, and to be valid should have been in writing. If the covenant be simply and solely one extending the time for the performance of a prior written contract, it cannot be that oral agreement spoken of in section 1698, for it is not the original contract as altered, which must be executed, but the oral agreement alone, and an oral agreement simply extending time cannot be executed, for there is nothing to execute. No affirmative action is required. Such an agree-

ment calls for nothing to be done, and expires by the mere lapse of time. Another view of this matter, even more conclusive against plaintiff's contention, presents itself. An oral agreement does not alter a contract in writing unless it becomes an *executed* oral agreement. The oral agreement relied upon in this case was not valid when made for it was not executed at that time. According to plaintiff's claim, it was not executed until months after September 1, 1885, the time fixed for the expiration of the original contract itself. Upon September 1, 1885, the written contract expired by express provision, unless some valid agreement then in existence kept it alive, but at that time there was no valid agreement in existence. The oral agreement was no agreement until executed, and it was not executed until long after that date, and when executed there was no existing contract in writing which might or could be altered. The date when an oral agreement takes effect as altering a written contract is the date when it is executed. It then has the same effect as an agreement in writing of that date altering the original contract."

We insist that this case is authority for our position when we contend that the alleged oral agreement between the parties in the case at bar, to-wit: the agreement to furnish the extensions did not become executed prior to the expiration of the fifth day. The oral agreement was no agreement until executed, in the words of the Supreme Court in the above case, and if it did not become executed until after the expiration of the time within which the defendant was to decide whether the engine was sufficient and adequate for his needs it

was not an executed oral agreement sufficient in form to vary or modify the terms of the written contract itself.

Upon the second assignment of error presented [page 112, original certified record; bottom page 113, Transcript] we have only this to say, that if it was error to permit the introduction of oral testimony to alter or modify the terms of a written contract, as set forth in the first assignment, it was also error to permit the introduction of the same testimony, if the effect was to prove an oral waiver of a written five-day limitation. It matters not whether it be a modification or a waiver, —it must be in writing in either case, unless executed.

The third assignment of error [page 112, original certified record; page 114, Transcript] presents the ruling of the trial court upon an objection to testimony as to representations made prior to the execution and delivery of the written contract. Defendant in error was permitted to testify that a printed circular was shown to him by the agent of plaintiff in error, prior to the signing of the contract, and used by the agent in the negotiations to induce him to sign up, and the circular itself was offered in evidence over objections [page 67, original certified record; pages 66 and 67, Transcript]. It was error to permit this testimony because the answer did not allege either that there were misrepresentations by the agent, or that defendant in error was induced to enter into the contract by the fraudulent representations that the speed of the tractor would be greater than it actually was. The contract required plaintiff in error to furnish an engine which

would "prove adequate for your work," and the answer was founded on the theory that it was not in fact adequate, and on no other theory. On another occasion the court permitted defendant in error to testify, over objection, as to a representation as to the speed of the tractor, made to him prior to the execution of the contract [page 62, Transcript]. This was error because the written contract superseded all prior negotiations and no evidence other than the contents thereof was permissible, unless it was alleged that such representation was falsely or fraudulently made to induce the making of the contract, and this the answer did not allege.

Upon the fourth assignment presented [page 113, original certified record; page 114, Transcript], nothing additional need be said. The error assigned was the ruling of the court permitting oral testimony as to certain other representations made prior to the execution of the written contract, the pleadings not presenting an issue of fraud or mistake.

The fifth and sixth assignments present the ruling of the trial court in permitting testimony showing a modification of a written contract by an agent beyond the scope of his authority. This was error. Plaintiff in error moved to exclude the testimony unless it was followed by proof, establishing the authority of the agent. [Page 701, original certified record; page 69, Transcript.] Defendant in error failed to offer this proof. The motion shoold have been granted, and the ruling of the court, denying the motion, was error.

The seventh assignment presents the special finding of the trial court to the effect that plaintiff in error, by its conduct and representations, waived the right to require defendant in error to decide on or before the fifth day whether the tractor was adequate for his needs. In addition to his written conclusions, the court made a special finding upon this point [No. 7, bottom page 31, Transcript] and we have presented this special finding as error, in a separate assignment, in addition to the first and second assignments, presenting the same question upon the admission of the testimony which supported the special finding. What has been said above in argument upon the first and second assignments will apply here, without repeating the same at length.

The eighth, ninth and tenth assignments present error in holding that there was a breach of warranty by plaintiff in error as to the covenants of the written contract. The contract contained this clause "above engine is sold with the understanding that it proves adequate for your work." We believe the testimony conclusively showed that it was adequate for the work of defendant in error. It is true that the question whether it was in fact adequate is a question of fact, and we know that this Honorable Court will not disturb the ruling of the trial court upon a question of fact, yet we understand that where there is no evidence, or not sufficient evidence to support a finding, the appellate court will review the testimony to determine whether the trial court erred in its finding upon a particular point. The trial court found that plaintiff in error

agreed to furnish a tractor "adequate for the needs" of defendant in error, and that the tractor furnished was not adequate, and that therefore there was a breach of this covenant. We sincerely believe that there was no evidence that the tractor was inadequate and if there was no evidence to support this finding, the appellate court will inquire into, consider the testimony, and determine the question.

That there was no evidence of inadequacy is best shown by the testimony of defendant in error himself, and his testimony shows, unwittingly perhaps, that it was entirely adequate for his needs. Without repeating at length, he says that he had 1500 acres, or a little better, of land, to be summer fallowed. That he bought the engine March 25th and it was delivered at his ranch April first. That he used it continuously until June 13th, except during such time as it was broken down and defective parts were being replaced. That he bought it, expecting to use it day and night and to that end employed a day man and a night man to operate it; that because of defective material, it was out of commission from April 3rd to April 10th, and from April 22nd to April 27th, and from May 1st to May 17th. Deducting the days it could not be used from the number of days from April 1st to June 13th, leaves forty-six days during which it was in good condition and ready for use.

If it be true, as he claims, that he had 1500 acres to summer fallow, and if it be also true, as is the fact, that he had 46 days within which to do this work, it is a matter of mathematical calculation only to deter-

mine that the work could be accomplished at the rate of between 32 and 33 acres per day. Assuming for the sake of argument only, that it was true, as contended by him, that the engine when in the field and pulling two gang plows did not operate at a speed in excess of 1¼ miles per hour, this would be a distance of 6,600 lineal feet. He testified that his plows were six-gang plows with 8-inch shares. If there were six gangs in each plow and each share was 8 inches wide, then the plow when in operation would cover a space of 48 inches, or six times eight. Two plows would cover a space of twice this amount, or 96 inches, or 8 feet. Multiply the lineal feet covered by the engine pulling the plows at the rate of 1¼ miles per hour, or 6,600 lineal feet, by 8 feet, and we have 52,800 square feet as being the area of ground which could be plowed by this engine pulling two plows only, providing each plow contained six gangs, and each gang or share was 8 inches wide. An acre of ground consists of 4,840 square yards. There are 9 square feet in each square yard, or 43,560 square feet in an acre. If we divide the number of square feet in an acre into the number of square feet which the engine traveling at the rate of 1 mile per hour, and pulling two plows only which were 8 feet in width, will plow, a total of 52,800 square feet, we have an engine which is able to plow about 1¼ acres per hour. There are 24 hours in a day, and this engine should therefore plow 30 acres for each working day according to the testimony of the defendant himself.

Having 1500 acres to plow, and 46 days within which to do that plowing, that it was only necessary for de-

fendant in error to plow between 32 and 33 acres in order to accomplish his work. The difference between the 30 acres which could be plowed by the engine, if it only accomplished its work at the rate of one acre per hour, and 32 acres which it should have accomplished in order to plow the entire 1500 acres in 46 days, is easily made up by the use of one more gang plow. He admitted that the engine was capable of pulling three plows the same as it did pull two plows. If he had used three plows, as he might have done, and as he admits the engine was capable of pulling, he could very easily have plowed the entire 1500 acres within the time which was at his disposal. We have thus demonstrated that this engine was adequate for the defendant's work, and we have demonstrated this fact conclusively from the testimony of the defendant in error himself. We submit, therefore, that the tractor was entirely adequate and that there was no breach of warranty in that respect and that the trial court erred in so holding.

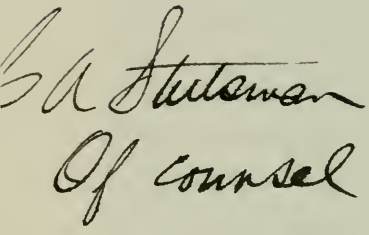
This completes the assignments of error as presented by the record. We believe the errors assigned were rulings erroneously made upon material questions, and that the judgment should be reversed. Aside from the questions of law involved, equity and reason favor a judgment for plaintiff in error, rather than for defendant in error. His only complaint against the tractor was that it did not make speed enough and yet the undisputed testimony upon the trial showed that he plowed nearly 600 acres of his ground, after he discovered this fact. This use of the tractor by him made

it a second-hand machine. It is not fair nor right that he be permitted to do this and then turn it back to plaintiff in error and refuse to pay for it. The judgment of the trial court should be reversed and a new trial ordered.

Respectfully submitted,

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff in Error.



United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Fairbanks, Morse & Company, a corporation,
Plaintiff in Error,

vs.

J. M. Nelson,
Defendant in Error.

REPLY BRIEF

STATEMENT OF THE CASE.

The parties to this action entered into a written contract for the sale by plaintiff in error and the purchase by defendant in error of a machine known as a 30-60 horse-power tractor, for the sum of $3600, evidenced by three promissory notes for $1200 each. The contract provided that "above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine, we agree to furnish competent man for 2 days within 10 days of re-

ceipt of engine at Alessandro. This man to operate and demonstrate the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not." (Transcript, page 91, original certified record, pages 88-89). The machine was purchased for drawing a combined harvester as well as for plowing. (Transcript, page 58, original certified record page 60; also Transcript page 71, original certified record page 70). The machine was sent to Alessandro station in Riverside County, April 1, 1912, and the time from 2 p. m. until 7 p. m., that day, was consumed in moving it from the station to the ranch of defendant in error. (Transcript, page 45, original certified record, page 48.) On April 2 the demonstration on the ranch of defendant in error began and continued until sundown and was resumed April 3 and continued until 4:25 p. m., that day. (Transcript, page 45, original certified record, pages 48-49). During the alleged test numerous difficulties arose; the ground was wet in places; the wheels of the engine made deep depressions in the field; the wheels slipped; it was necessary to put stones and cactus under the wheels and to take off one of the gang-plows, and to jack up the other plows in places. Defendant in error called attention of the representative of plaintiff in error to these matters and the latter stated the difficulties could be overcome by putting wide extensions on the wheels so as to give them greater bearing on the ground. (Transcript, page 59, original certified record, pages 60-61). He also stated he would hurry home to telegraph for the

extensions. (Transcript, page 60, original certified record, page 61). He also stated defendant in error should have disc plows. (Transcript, page 61, original certified record, page 62). Reuland, the representative of defendant in error, denied on the stand that these extensions were promised, but the fact remains undisputed that the extensions were furnished and that without cost to the defendant in error. (Transcript, page 61, original certified record, page 62). Numerous breaks on the machine occurred and its use was interrupted frequently for long periods until May 17, when the extensions were put on. (Transcript, page 62, original certified record, pages 62-63). Defendant in error continued to do the best he could with the machine because Reuland told him to. (Transcript, page 71, original certified record, pages 70-71). No better results following the use of the extensions, defendant in error ordered new disc plows in accordance with Reuland's suggestion and they arrived and were attached May 28. (Transcript, page 62, original certified record, page 63). Still the machine did no better and defendant in error on that day telephoned a complaint to plaintiff in error asking that a man be sent to see about it. (Transcript, pages 63-64, original certified record, page 64). He notified them again on June 4th, and on June 7th without satisfaction, and finally on June 14 wrote and notified them he was ready to help load it on the cars according to contract. (Transcript, page 65, original certified record, page 65.)

Plaintiff in error sued upon the contract and notes,

and upon the issues presented on the trial, the District Court found in favor of defendant in error and judgment followed that plaintiff take nothing and defendant recover his costs.

POINTS AND AUTHORITIES.

The first assignment of error urged by plaintiff in error relates to the introduction of oral evidence to alter or modify the terms of a written instrument, as plaintiff in error claims. He urges that this is in violation of Section 1698, Civil Code of California. It is a curious position for the plaintiff in error to take. The contract required a two days' test of the machine on the ranch of defendant in error. The undisputed testimony was that no test was made on Nelson's (defendant in error) place, except on April 2 and April 3. The demonstration stopped about 4:30 the afternoon of April 3, although the test was to be "during working hours," and after the demonstrators left, work continued on that day until the machine broke down, showing that working hours were later than 4:30 p. m. (Transcript page 61, original certified record page 62). Plaintiff in error claims to be excused from the full test required by the contract because of a conversation occurring between Nelson and Reuland just before the departure of representatives of plaintiff in error. (Transcript page 46, original certified record page 49; also testimony of McDearmon, Transcript page 49-50, original certified record page 52; also testimony of Nelson, Transcript page 60-61, original certified record page 62). Yet while claiming that this oral conversa-

tion was a waiver of the contract provision for a full two days' test required of plaintiff in error, the claim is made that there could be no waiver of any provisions of the contract making requirements of defendant in error.

In a large number of authorities that we cite later in this brief on the point that retention of a machine beyond the stipulated time is excused when such retention is induced by promises and representations of the seller, a large proportion hold that such conduct on the part of the seller is a *waiver* and is not a variation of a written instrument by parol. The decisions of this state are to the same effect, the latest case on this particular point being

> Luitweiler etc. Co. v. Ukiah Water Company, 16 Cal. Appeals 198,

where it is stated on pae 208:

"The delay in the rescission of the contract has also been adverted to and was excusable for the reasons mentioned. 'If the return of the machine warranted to do good work and found upon trial to be unfit for use is delayed at the request of the manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed.' (Fox v. Stockton etc. Works, 83 Cal. 333, 23 Pac. 295). The buyer's retention and use of the article *beyond the stipulated time* will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or

his agent or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects. (30 Am. & Eng. Ency. of Law, p. 188)"

That there can be such waiver, and that it is not in conflict with the provisions of Section 1698, Civil Code, is discussed in

Knarston v. Manhattan Life Ins. Co., 140 Cal., page 57.

On pages 62 and 63 of this opinion this particular point is discussed, and we particularly call attention to the following extract from the opinion:

"The provision of the code, as well as the stipulation for a forfeiture in the policy, were equally matters of benefit to the company, and it is the rule, that not only provision in a contract may be waived by the party for whose benefit they are inserted, but that he may also waive statutory, and even constitutional provision, under which he may derive a benefit. 'It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured.' (Broom's Legal Maxims, 547.) 'It extends to all provisions, even constitutional and statutory, as well as conventional. The law will not compel a man to insist upon any benefit or advantage secured to him, individually. Hence it was the privilege of the insurers in this case, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficacy of

any insurance as it was a provision inserted for their benefit, and in which they alone were interested. This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred; and it may be by the managers of the company, or by a duly authorized agent; and as it was done by the latter in this case, it was obligatory upon the company."

While this is an insurance case where forfeiture, on account of non-payment of the premium, was waived, yet it shows the attitude of the Supreme Court of California on this question of waiving a provision beneficial to the party making the waiver and, as stated above, a large proportion of these threshing machine and agricultural cases refer to such circumstances as a *waiver.*

The voluntary offer to put on extensions, followed by the actual furnishing and attachment of them to the tractor without cost to the defendant, was an admission on the part of plaintiff that their machine was not a complete machine; that it was not in condition to be tested. Such action was a waiver of any action required of the defendant. So were the representations as to the disc plows and the promises to send a man to test the machine. Anything that led the defendant in error to a belief that the seller would make the tractor comply with the warranty as to adequacy, and which led him to refrain from an immediate rejection of the machine, was a waiver of the requirement that he rescind the contract or reject the machine within a certain time. We believe that it is abundantly shown

throughout the entire record that defendant in error was deterred from a rejection of the machine by the statements, promises and representations of the agents of the plaintiff and that therefore any delay that there may have been in rejecting the tractor was excused, the company having waived its right to exercise of the defendant's option to keep or to reject the machine within a certain period.

As contended by us, the machine was not complete, and it was conceded by the plaintiff that it was not when they promised to send and did send extensions in an effort to improve the speed and keep it from sinking into the ground, and as pertinent to this point we desire to cite the case of

Sherman v. Ayers, 20 Cal. App. 733.

decided by the District Court of Appeals for the Second Appellate District, on December 28th, 1912. The court holds that

"It is contended by appellant that a clause in the contract provided that operation should constitute acceptance, and that the use by defendant for a short time of the engine was tantamount to an acceptance. It is true that such contract did provide that operation should constitute acceptance, but it certainly appears that no operation *after a complete performance of the contract* is shown. On the contrary, the whole of the operation, either by the employes of plaintiff's assignors,

or by defendant after they left, was in an effort to procure, of possible, information as to any existing defects, and to determine whether or not the same could be made to operate. The evidence does not disclose such an operation as, under the authorities cited, constitutes an acceptance. The case of Jackson v. Porter Land & Water Co., 151 Cal. 33, relied upon by appellant in support of the proposition that the operation was equivalent to an acceptance, is not an authority under the circumstances of this case. In that case the party had contracted for an engine of certain horse-power; it was installed with lesser horse-power; the purchaser had knowledge of that fact and with such knowledge commenced and continued the operation of the pumping plant during an entire irrigating season, and then for the first time raised the question as to the horse-power which should have been furnished. In the case at bar the defects were apparent, were recognized and the attention of plaintiff's assignors was called to them. The operation was not one, under the circumstances, *after completion* and was not such as would justify a court in saying that the machinery had ever been operated, or that the attempt at operation was the equivalent of acceptance."

On the general question of whether the conduct, statements and representations of the plaintiff's agents were such as to excuse a failure to return the engine within five days, the authorities seem to be abundant that under circumstances such as have been shown in this case the delay is excused.

The case of Luitweiler etc. Co. v. Ukiah etc. Co., 16 Cal. Appeals, page 198, is one that presents many features of similarity with the case at bar. The reported case is quite lengthy, but a perusal of it will show that in its essential features it did not materially differ from our case. In that case a pump was purchased by the defendant from the plaintiff. It was delivered late in May, 1907, and was not put in operation until about the middle of October of that year. When it was put in operation the defendant sent a portion of the purchase price and later made complaint that the pump did not mee the warranty. There was much correspondence between the two companies, the pumping company suggesting various methods to overcome the defects complained of. The suggestions were adopted but without success. The water company used the pump for about three months. No written offer to return the pump was made until after the commencement of the suit, and it is stated on page 203 "the delay and continued use of the pump were due to the hope that the difficulties might be overcome and the pump so adjusted that it would do the work."

The Court in the opinion discusses the rule to which we have referred, and it is set out in the syllabus as follows:

"Delay in Rescission Excused—Warranty not waived.—The delay in the rescission of the contract was excused under the circumstances in proof, where it was at the request of the seller or his agent for the purpose of giving them an opportunity to remedy de-

fects, and the warranty was not waived by such delay."

We also desire to cite on this point:

Fox v. Harvester etc. Works, 83 Cal. 333.

In this case the syllabus states the rule as follows:

"Return of Unfit Machine—Waiver of Delay—Pleading.—If the return of a machine, warranted to do good work, and found upon trial to be unfit for use, is delayed at the request of the manufacturer, he thereby *waives* the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed."

In the above case two combined harvesters were sold for $3600.00, and the warranty was that they would do good and satisfactory work. The complaint alleged that the machines wholly failed to do satisfactory work during a greater part of the harvest season of 1884; that the purchaser expended large sums of money and lost valuable time in attempting to make the machines meet the warranty. They further allegt that they returned the harvesters immediately *after becoming fully satisfied* that they were not capable of doing good and satisfactory work, and the suit was for damages and return of the purchase money. The principal questions decided came up on the questions of instructions and the Supreme Court affirmed the decision, which was in favor of the purchasers of the machines. The instructions criticised, but which the Supreme Court approved, were to the effect that if the jury found that the guarantees had been made, and that a proper ef-

fort had been made to operate the machines in the harvest field and that they did not substantially do the work warranted, and that after plaintiffs were satisfied of such failure, the plaintiffs returned such machines to the defendant, that the verdict should be for the plaintiff.

In our case we claim that the evidence abundantly shows that Nelson offered to return the machine just as soon as he became satisfied that the company could not or would not make the tractor do the work which they had warranted.

Another instruction, also approved in the Fox case, was as follows:

"If, at the request of one of defendant's authorized agents, the plaintiffs did not return the machines until the spring of 1885, then the defendant *waived its right* to require the prompt deliver of the machines to the defendant on the discovery by the plaintiffs of the fact, that the machines did not do the work the defendant guaranteed they should do."

So far as we have been able to discover there has been no modification of this rule by the Supreme Court or the Appellate Court of California.

In the opening brief of plaintiff in error there is an attempt to draw a distinction between the case at bar and the case of Knarston v. Manhattan Life Insurance Company, 140 Cal. 57, to which reference has been made hereinabove. The claim is made that, be-

cause in the Knarston case the policy did not require an affirmative act on the part of the assured, the case is distinguishable from this case, but it should be remembered that the decision in the Knarston case turned on the fact that the law is that a party can waive a provision that is for his benefit, whether it be constitutional, statutory or contractual, and it makes no difference whether there are reciprocal obligations in that respect or not. The provision limiting the time within which defendant in error could reject the machine was one made for the benefit of plaintiff in error, and was therefore one which it could waive. An examination of the Knarston case will fully disclose this. The Court says that the insurance company "entered into negotiations with the insured, treating the policy as still in force, and evidencing an intention to waive any right it might have to insist upon the forfeiture." In our case the plaintiff in error treated the contract as still in force, negotiated with Nelson, furnished these extensions, sent its agents and mechanics out to his place numerous times, and corresponded with him, all being in an attempt to make the machine do what plaintiff promised it would do.

We also call attention to the conclusions of the trial court (Transcript pages 37-41). Especial attention is called to the opinion of the trial court on the point under discussion found on page 38 of the Transcript. What we have said herein is also a sufficient reply to the discussion in the brief of plaintiff in error of the cases of Hennehan v. Hart, 127 Cal. 656, and Platt v. Butcher, 122 Cal. 634. Our position is that the evidence

to which objection is made was not for alteration of a written contract, but was evidence of a waiver of a provision for the benefit of plaintiff in error.

In the cases hereinbefore cited and those which follow in this brief, the courts continually refer to such circumstances as existed in this case as constituting a *waiver,* and we believe that our case has fully been brought within the rules thus announced by the courts.

We desire to call the court's attention to a number of cases which have been decided in the Courts of other states under similar contracts for the sale of machinery to be operated, but having, some of them, practically the same provisions contained in the contract before the court, and some of them other provisions of similar nature relative to the manner of determining whether or not the machines comply with the warranty, and as to the manner and time of determining such cases. In many of these cases the attempts on the part of the company and the purchaser extended through many months.

These cases in principle and in their facts apply to this case and the provisions of this contract relating to the return of this machine in case of failure of warranty. We desire to quote somewhat fully doctrines from a few of these cases and will cite many others, each of which we have fully examined, and all of which throw light on this question as to what is expected and required legally of a purchaser under circumstances as is detailed in the evidence in this case. The first of these cases to which we call attention is

Advance Thresher Co. v. Vinckel, 121 N. W. 432.

(Quoting from the syllabus). "The fact that notice of failure of the machine to fulfill the requirements of a printed warranty is not given in the manner provided by the contract is no defense against an alleged breach of warranty, where vendor under such notice as is given him by the vendee undertakes to remedy the defects complained of by the latter."

"Where a contract for the sale of a machine provides that a retention thereof by the vendee beyond a given period will operate as a waiver of defects, held to be inapplicable where the vendor induced the vendee to retain the machine under a promise that defects should be remedied."

In this case the machine in controversy was a threshing machine.

The terms of the contract as quoted by the Supreme Court in this case were as follows:

"That the separators if properly run and rightfully managed are not excelled by any separator manufactured of the same size in their adaptation for separating and saving from the straw the various kinds and conditions of grain and seed. * * * That upon starting the machinery and the purchaser using the usual care and skill of threshermen, is unable to make the * * * thresher * * * to operate well, he shall within five days from the day of the first use, give written notice to the company at Battle Creek, Michigan, by registered letter, stating * * * wherein it fails to fill the war-

ranty, and, also, within said time, shall notify the agent through whom he purchased, and a reasonable time shall be allowed them to get to the machine and remedy the defects, * * * and longer use or without notice is to be a fulfillment of all warranty."

Considering the questions as involved in the case the court in its opinion says:

"It has been held by this and other jurisdictions that where the vendor, by its agents, sends machine men or experts to the scene of trouble for the purpose of trying to remedy the defects complained of, that the service of notice in the strict manner pointed out by the contract is thereby *waived,* no matter by what means the vendee caused notice to be conveyed to the company or to its duly authorized agents. It has come to be a familiar rule of construction where applied to contracts prepared by the vendor for his own protection that such contracts will be construed most strongly against him." (Citing numerous Nebraska cases and the case of Buchannan v. Minneapolic Company, 116 N. W. 335, N. D.)

We claim that there was no proof before the court which establishes that a test was ever made or pretended to have been made by the plaintiff for two days, in accordance with the terms of our contract.

On the contrary the evidence shows that the machine was to be demonstrated "regular working hours during his stay on your (defendant's) place." (Transcript page 91, original certified record, page 89.) That de-

fendant expected to work night and day (Transcript page 58, original certified record, page 60-61); that it was after nine o'clock in the forenoon of the first day when operations at defendant's place started (Transcript, page 58, original certified record, page 60); that it was 4:30 o'clock in the afternoon of the second day's work at defendant's place when the plaintiff's representatives left (Transcript, page 61, original certified record, page 62). This was several hours short of the two days' demonstration for which the contract provided. Further, it was practically conceded by the plaintiff's representative, Reuland, that the machine was not in proper condition at the time and that the extensions for the bull wheels were required and should be attached to make the machine adequate for defendant's work. Defendant called Reuland's attention to the deep impressions made by the bull wheels "and he said we should overcome that by putting extensions on." (Transcript, page 59, original certified record, page 60). That the demonstration did not continue for two days during working hours upon defendant's place is further shown by the fact that work was continued the second day after plaintiff's men left (Transcript, page 61, original certified record, page 62). The extensions mentioned by Reuland were procured and attached without any charge being made against defendant) Transcript, page 61, original certified record, page 62) which is very persuasive of the fact that the plaintiff did not regard its machine as complete and ready for demonstration without them. Their contract did not require them to fur-

nish additional parts, but only defective parts, so that when they did furnish additional parts, it is conclusive that they should have been originally included in the machine.

From that time forward plaintiff never did attempt to make any test, as specified in the contract, of the machine so materially altered, and never at any time after those extensions were placed on the machine, for two days, or even half a day, remained with that machine for the purpose of testing it out in response to the demands and claims of the defendant.

In the case to which we have referred the court further says:

"The plaintiff makes complaint that the defendant kept the machine beyond the time permitted by the terms of the contract after the discovery of the alleged defects. This and other jurisdictions have held that where the vendor or his agent induces the vendee to keep a defective machine upon the promise of putting it in condition to do effective work, the vendor thereby *waives* the condition which provides that to keep the machine beyond a certain time is a waiver of the warranty by the purchaser. This is a reasonable rule, and we are not disposed to find fault with it. The record shows that on several occasions the plaintiff not only sent practical threshermen to the machine for the purpose of trying to repair it and to put it in working condition, but that on at least one occasion, as the defendant testified, one of the authorized agents of the plaintiff induced the former to retain the machinery

upon the promise of repairing it. This was denied by the plaintiff's agent; but the testimony upon this point, as upon others, was fairly submitted to the jury. But in any event, it is fairly established by predonderance of the evidence that the plaintiff, by its agents and skilled workmen, made an honest endeavor to put the machine in good working order, but failed to do so. This circumstance serves in a measure to corroborate the contention of the defendant that the retention of the defective machine by him was at least with the *implied,* if not express, agreement that the defects would be remedied by the plaintiff, and we are not disposed to hold from the testimony as disclosed by this record that the defendant waived any right conferred upon him by the contract in retaining the possession of the machine under the circumstances shown by the evidence."

We next call the court's attention to a case in the state of Tennessee:

Garr, Scott & Co. v Stark, 36 S. W. 149.

In this case was involved a contract for a threshing machine, dated April 5th, 1889, with warranty, and time one week for a test of the machine. In case of failure the contract provided for notice to the company and their agent and required the purchaser to allow them time to remedy the defect and also to render friendly assistance. It further provided that if the machine could not be made to fill the warranty the purchaser to return it to the place where received, and further provided that more than one week's use was to be considered an acceptance of the machine, title of the

same to remain in Garr, Scott and Company until paid for. The machine was delivered at Gallatin, Tennessee, about April, 1889. At the time the machine was delivered the defendant noticed some defects in the machine and that some tools were missing, and these defects were called to the attention of the agent who said the company would make good this or any other defects there were about it. The machine was put in operation under the direction of an expert of the company and his attention was called to some of these defects, but he stated that the defect would not be serious, but if anything was wrong the company would fix it, and he agreed to notify the company of it. The expert could not remain to get the machine to work successfully. The machine was tried by defendants for parts of three seasons but they were never able, though they had it in the hands of suitable and experienced men, to make it work successfully and could never work it except at a loss. It had proper use and management and it did not work better nor equal to any first class machine made for doing the same work. In fact it would not work at all except at a loss to those owning and using it. It was not fit and suitable for the purpose for which it was sold; was broken; rotted in parts; badly adjusted and defective. The defendants attempted to run the machine a part of three seasons but disastrously each time, and were only able to thresh a few crops each season, and those at a loss and not well done, and had to abandon the effort each time, and finally laid aside this machine to get another, which they did. The presentation of the facts by the

court extends through several pages of the report. We have only given a portion of them, and the various claims that were made by the company, very similar to what is made here, were insisted upon, especially as to the delay in returning the machine and their alleged failure to make complaint, also considered by the court.

With reference further to the provisions of the contract, very similar in many respects to the one before the court, the following language was used, referring first to the case which has been cited as sustaining the plaintiff's contention:

"That case, however, is, in our opinion, applicable to one phase of this case, the principle decided being that parties are remitted to the remedies and measures provided for in the contract. The contract in this case that if the machine did not work, the plaintiff, on notice, which it had, had the right to remedy the defects, which it did not do, and, in case it failed to do so, defendants were to return the machine, which they finally did. But, under the stipulations of this contract, defendants would have no right to spend money on this machine and charge same up to plaintiff, nor to run it at a loss and recover such as damages against plaintiff. This, as we take it, was exactly one of the contingencies intended to be provided against if the machine would not work. The remedy was to return it, not to run the plaintiff in debt by the unauthorized use of it. A retention of the machine awaiting repairs, or for further trial, whether by mutual agreement or at special request of plaintiff's attorney, could not, we think, ren-

der defendants liable for the entire price, nor make plaintiff responsible for repairs it did not authorize, nor losses and damages it did not contemplate."

The above case was decided in the Court of Chancery Appeals of Tennessee and was affirmed orally by the Supreme Court of the state on December 20th, 1895. It is a suggestive case in this instance and demonstrates how fully the courts have been inclined to protect parties against these contracts where they have in good faith given the companies every opportunity to try to repair and adjust their machinery so as to make it comply with their agreement, and how fully the courts have endeavored to protect purchasers from the strict construction of the contracts claimed by counsel for plaintiff as applicable in this particular case.

We were somewhat surprised at such claim in view of the facts, especially that the agent of the company sent to supervise what they claim was a test of the machine, when noticing that the machine was not working properly, but was sinking into the sand and into the soil, declared that it was possible for the machine to work properly and proposed himself to send for these extensions, weighing about 2400 pounds, and to have them placed on the machine in order to overcome this failure and defect. (Transcript, page 59, original certified record, page 60). This same promise was made by the selling agent, Henry Reuland. (Transcript, page 61, original certified record, page 62).

There is no question but what defendant had a right

long before those extensions came to have notified plaintiff to take that machine away and that he was ready to assume the burden of helping to load it on the cars and pay the freight on it back to Los Angeles, but he stood on no such legal right but waited patiently to give the company an opportunity to try to make its guaranty good, believing of course that the representations of the agent would improve and correct the slow movement of the machine.

Kinney v. Bevilheimer, et al., 64 N. W. 215, (Ind.)

A grain separator and stacker was the machine constituting the subject matter of this action. In this case was involved the question of retaining the machine in the possession of the buyer after it was found to be defective and unfit to do good work, and after the vendor had attempted to repair or perfect it. The findings also disclosed the fact that in keeping the machine in their possession the vendees acted upon the request of the seller's agent, who promised that the machine would be made to work. The case is suggestive and in this respect applicable to the case before the court.

Springfield Engine & Threshing Co. v. Kennedy, (Ind.), 34 N. E. 858.

In the above case the contract was for a steam vibrating separator and attachments. It has involved in it the element of waiver, as involved in this case, and lays down rules with reference to the conduct and acts

of agents in this class of cases, which are fully applicable in this case before the Court.

South Bend Pulley Co. v. W. E. Caldwell Co., (Court of Appeals of Ky.) 55 S. W. 208.

In the above case there was a guaranty of the machinery and more or less correspondence in regard to failure of warranty and defects in machines, and finally an offer to return the goods; and the question was left to the jury as to whether the offer was made within reasonable time, and this notwithstanding the fact that the offer to return the goods was not made for something like six months after the last letter which passed between the parties in regard to the appellant's liability on the warranty.

Massachusetts Loan & Trust Co. v. Welch, (Minn.) 49 N. W. 740.

This case presents long continued attempts on the part of the purchaser to operate a threshing machine; the subject matter of the controversy, with many promises and efforts and delays on the part of the company to so repair or adjust the machine as to make it comply with the guaranty, and the principal point in the case is stated in a portion of the syllabus No. 5, as follows:

"And where such agent, under his legal authority to make, or cause to be made, suitable repairs, has taken charge of the machine for the purpose of 'righting it,' and, upon experiment thereafter, it continues to work badly, and not as warranted, and the buyer, under his

direction, continues to use it in reliance upon his promise to fix it and put it in complete repair, which he fails to do, the buyer does not forfeit his right to recover upon the warranty by reason of the expiration of the time limited in the contract for the trial thereof before the repairs are fully made; and the subsequent recognition of the acts of its agent by the seller in attempting to complete the repairs as promised by him, will also be held a *waiver* of the strict terms of the warranty in respect to the trial of the machine."

Roth v. Continental Wire Co. (Court of Appeals, St. Louis, Mo.), 68 S. W. 594.

This was a case of the purchase of machines by sample, and one of the questions decided was the following, reading from the syllabus:

"When the purchaser of machines by sample repeatedly complains to the seller that the machines are not satisfactory, and both parties attempt to remedy the defects, the retention of the machines by the purchaser, and his failure to rescind the contract, do not raise an inference that the machines are satisfactory."

This case occupies a number of pages of the report, the case having been submitted to a referee, whose findings and conclusions are embodied in the decision, together with an extended consideration of the case by the Court of Appeals, and the case contains many helpful suggestions as applicable to this one.

Parsons Band Cutter & Self-Feeder Co. v Gadeke, (Neb.), 95 N. W. 850.

This case was an action brought to recover upon two notes given for the purchase price of a machine. Breach of warranty was alleged, and in the opinion the court lays down this doctrine:

"Defendants claimed that they kept the machine longer at the solicitation of the agent through whom it was purchased, and by reason of his repeated promises to make it fulfill the terms of the warranty. The court instructed that such facts, if shown, would operate as a *waiver,* and would preclude the plaintiff from insisting upon the conditions, which was in full accord with prior rulings of this court."

D. M. Osborne & Co. v. McQueen, (Wis.), 29 N. W. 636.

This case has some of the features of the one before the court. In this case the defendant was not charged with an acceptance of the machine because he kept it beyond the time defined in the contract for the purpose of giving it a new and fair trial after it was repaired. The machine had been twice repaired prior to that time and the plaintiff had refused either to repair it again or to return the money paid on the note.

First National Bank v. Dutcher, 128 Ia. 413, s. c. 104 N. W. 497.

This case grew out of a written contract of date September 9th, 1901, for the purchase of a corn husking and shredding machine, with warranty, and requiring the purchaser to give written notice to the company, or

its local agent, if, after two days trial, the machine proved to be not as represented.

The case sets out notice of the failure of the machine and extended efforts on the part of the manufacturer to so operate the machine as to have it comply with the warranty, and the failure of these efforts. These acts and trials by different persons to try to adjust the machine extended on down until after December 24th, 1901, and at this time the defendant wrote a letter to the manufacturer informing it that its expert and agent had been laboring for weeks to make the machine do good work but without success, and that he requested him to keep on with the trial. The letter further states his discouragement and dissatisfaction with the results produced but offered to persevere in the trial if the company will remedy the defects complained of.

The court, on this question of the promptness in returning the machine, says:

"Now, so long as the appellant's agents and experts continue to work the machine and hold out encouragement to the appellee that it would be made as warranted, we think he was justified in postponing its return." (Citing authorities.)

"Those efforts continued down to within a short time before the return was actually made. About this time appellee, as we have seen, addressed the company directly, rehearsing his troubles with the machine, and asked that some one be sent direct from the house to

see it and make it good if possible. The answer was of a character to invite still further trial, and we cannot say as a matter of law that the returning of the machine five ays later was not in reasonable time."

This is well worthy of careful examination, and it lays down a number of rules of law applicable to this case which seem strictly in accord with justice, and which we think will aid the court in arriving at a just conclusion in this case.

First National Bank v. Erickson, (Neb.), 31 N. W. 388.

This case, being one relating to a harvester and binder combined, is one in which, by its facts as set out, the manufacturer waived the right to have return of the property within a time specified in the contract in case it did not give satisfaction.

McCormick Harvester Machine Co. v. McMuller, 95 N. W. 507.

The facts of this case set out the questions which the court submitted to the jury for the purpose of enabling them to arrive at their conclusion as to matters of fact, and among others was the question as to whether the machine did such work as it was warranted to do, whether the defendant gave it a fair and reasonable test or trial, and whether, if it did not do such work, the defendant, under the circumstances, used it for a longer time than he was justified in so doing, or within a reasonable time complied with his obligation to return it to the plaintiff.

Upon the second assignment of error counsel for plaintiff in error claims in his brief that it was error to permit the introduction of oral testimony to prove a waiver of the provisions in the contract with reference to the determination by defendant in error within five days whether the machine was adequate for his use or not. Our discussion of the first assignment of error in this brief has covered the ground raised in the second assignment of error, and it is unnecessary to here repeat what we have already said, but we merely refer to our discussion of the first assignment of error.

The third assignment of error refers to the admission of certain evidence over objection of plaintiff in error referring to a certain catalog shown to the defendant in error, and a statement made during the negotiations which led up to the contract.

In the case of Luitweiler, etc. Company vs. Ukiah, etc. Company, 16 Cal. App. 198, to which reference has already been made, an exactly similar question arose, and the court on page 210 of the opinion observed: "It was proper to allow Mr. Brush to state that he relied upon the representations in plaintiff's catalog. The question involved a very important circumstance and the buyer may be asked whether in buying he relied upon his own judgment or upon the seller's representations. (Milwaukee Rice Machinery Company vs. Hamacek, 115 Wis. 422; 91 N. W. 1010). The court of course would not be bound by his answer, but it should be considered with the other facts and circumstances in the case."

Moreover we do not believe that the rights of the plaintiff in error were in anywise prejudiced by the admission of such testimony as will be found from a perusal of the conclusions of the trial court set forth in the transcript, pages 37 to 41 inclusive.

Section 1856 of the Code of Civil Procedure provides that when the terms of an agreement have been reduced to writing it is to be considered as containing all those terms, and there can be no evidence of such terms other than the contents of the writing except where a mistake or imperfection is put in issue, or where the validity of the agreement is the fact in dispute, but the section goes on to state that "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." And also in Section 1860 of the Code of Civil Procedure the provision is made that "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpretet."

The contract provided that the tractor should be "adequate for your work." The testimony was that Nelson told them the machine would have to travel two miles an hour at least, and they gave him to understand

that it would have plenty and ample power to do so. (Trans. p. 63, original certified record, p. 64).

The evidence objected to was certainly competent to explain what the parties meant by the provision in the contract that the machine be "adequate for your work," it being necessary to determine first what the work was and what power or speed was required to do it, and we submit that the evidence was admissible for the purpose of explaining in some degree the language used, and also as putting the judge in the position of the parties, and as explaining the circumstances under which the language quoted was used. This position is sustained also in the case of Balfour vs. Fresno C. & I. Company, 109 Cal. 221-226, as well as in the Luitweiler case supra.

What we have just said upon the third assignment of error is equally applicable to the fourth assignment of error The evidence was not offered in proof of any fraud or mistake, but for the purpose of explaining the language of the contract "adequate for your work," and of showing the circumstances under which the contract was made so that the trial judge could be placed in the position of the parties.

The fifth and sixth assignments of error relate to the question of whether the plaintiff in error was bound by the acts of its agents who visited the ranch of defendant in error unless followed by proof establishing the authority of such agents in that behalf. It is sufficient to say upon this question that there was full and ample ratification of the acts of the agents of the

plaintiff in error, Frank Reuland and Henry Reuland, in promising the extensions to the wheels. The extensions were supplied without cost to the defendant in error. (Trans. p. 61, original certified record, p. 62); also (Trans. p. 47, original certified record, p. 50).

We desire also upon this question to again cite the case of Advance Thresher Company vs. Vinckel, 121 N. W. 432. The court in this case says, with reference to the acts of the agents of these companies, as follows:

"To say that its agents were vested with the mere naked power to sell and deliver without any authority to waive or modify any term of the printed contract would be, as is well said in the Pitsinowsky case, 37 Ia. 9, to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith." (Citing authorities.)

Henry Reuland was the selling agent in this contract. (Trans. p. 55, original certified record, p. 57). He also made the promise about the extensions, as well as Frank Reuland, who operated the machine. (Trans. p. 61, original certified record p. 61). Also (Trans. p. 60, original certified record p. 61).

The seventh assignment of error relates to the finding of the trial court to the effect that plaintiff in error by its conduct and representations waived the right to require defendant in error to demand on or

before the fifth day whether the tractor was adequate for his needs. What we have already said in this brief upon the first and second assignments of error is applicable to the seventh assignment, and we hereby refer to the same without setting forth the same again at length.

The eighth, ninth and tenth assignments of error relate to the breach of warranty found by the court, and the claim is made by plaintiff in error that there was no such breach. The contract provided that "above engine is sold with the understanding that it proves adequate for your work," and our position is that the evidence shows that the tractor did not meet this requirement. While the defendant in error was made the judge of this, and he is not required to assume the burden of showing that it was not adequate, yet we contend that the evidence clearly shows that it was not. There is no evidence anywhere in the entire record that the tractor ever made a speed of more than one and a quarter to one and a third miles per hour in the field with the plows working. The only evidence upon this point is found in the testimony of Nelson (Trans. p. 62, original certified record p. 63); of Ferguson (Trans. p. 54, original certified record p. 56); of Dickerson (Trans, p. 73, original certified record p. 72); of Cell (Trans. p. 75, original certified record p. 73). There is ample testimony to show that in order to operate a combined harvester successfully a speed of two miles per hour or more is necessary. Nelson so testified (Trans. p. 63, original certified record p. 64). Dickerson testified to the same effect (Trans. p. 71, original certified

record p. 73), and so did the witness Cell at the close of his direct examination (Trans. p. 75, original certified record p. 73). The only attempt to controvert this evidence was through Cooks, but his testimony was shown to refer to a stationary engine and that he was not familiar with a machine in motion (Trans. p. 78, original certified record p. 76). It is also established that one of the reasons moving Nelson to the purchase of the machine was that it was to be used for harvesting as well as plowing (Trans. p. 58, original certified record p. 60). This is corroborated by Henry Reuland, the selling agent, who said "I gave him what the catalog says and that is all I know about it. I think he told me he wanted to pull a harvester." (Trans. p. 77, original certified record p. 75). We submit that the evidence therefore clearly shows that the tractor was not "adequate" for the work as was required by the contract. This is shown without any serious attempt at contradiction with respect to the harvester, as the evidence to which reference has just been made discloses, and these facts were ample to support the finding of the trial court as to a breach of warranty.

But we also claim that it was not adequate for the work with respect to plowing. It is shown that Nelson had 1500 acres of summer fallowing to do and that the season for summer fallowing should be finished by May 1st or before. (Trans. p. 58, original certified record p. 60). The testimony of Nelson, which is not contradicted in any place shows that the machine was operated on his place on April 2nd and 3rd for about one and one-half days, and that it then broke down; that it was then

used again beginning on the 16th of April and continuing to the 19th when a shaft broke, and a new one was put in on the 29th of April; the machine was then used again from April 30th for about a week, and was not ready for use again until May 17th, and was used then until May 28th when the disc plows were attached, and from May 28th to June 13th. Altogether this was a total of 34½ days. Sundays have been eliminated from this calculation because it was shown by Dickerson (Trans. p. 73, original certified record p. 72) that no work was done on Sundays, and in all the time that the machine was operated 585 acres were plowed (Trans. p. 71, original certified record p. 70), or an average of 17 acres every twenty-four hours. At this rate it would have taken nearly 100 days to summer fallow the 1500 acres, whereas the machine was not delivered until April 1st, and the work should have been completed by May 1st. A showing is thus made that Nelson failed to get over 900 acres plowed that season because the engine was not adequate for the work. Under the contract he is precluded from claiming damages suffered by reason of the failure of the engine. If the tractor had plowed approximately 50 acres per day the entire 1500 acres could have been finished within 30 days.

The evidence also plainly shows that the engine entirely failed to do any work at any speed on certain parts of Nelson's land. Dickerson testified that every once in a while they would strike a sandy place where they couldn't pull the plow and couldn't pull the engine out, and they would go around these places, which

would cut down the acreage a great deal. (Cross examination, Trans. p. 74, original certified record pp. 72 and 73). It is also shown that the sandy land is tillable and has raised crops. (Trans. bottom p. 59, original certified record p. 61). It thus appears that here is a positive showing, uncontradicted anywhere in the evidence, that the engine not only was not adequate for his work, but was an absolute failure to do any work on certain parts of the land. It may be urged that when this occurred it was incumbent upon Nelson to reject the engine at once, but as has been shown heretofore he was deterred from doing this by the constant promises and representations of the plaintiff that the extensions to these bull wheels or the change of plows would obviate the difficulties about which he was complaining to them. We contend that having by such promises and representations led the defendant to retain the machine for the purpose of giving an opportunity for it to be made good the plaintiff in error cannot take advantage of that and claim that he should have rejected the machine the moment he discovered anything at all that indicated that it was inadequate. In other words we do not believe that the plaintiff can take advantage of its own wrong in leading the defendant into a position where he could not reject the machine by making promises to him that it would be put in proper shape to become adequate for his work. It is our belief that there was no intentional misrepresentation in these promises but that all parties hoped and probably believed that the changes suggested would obviate the difficulties wihch were encountered, but it should be remembered that this is an experimental engine so far as operating it under

the conditions that prevail in California are concerned. It was admitted by Frank Reuland (Trans. top of p. 48, original certified record p. 49), and by McDearmon (Trans. p. 51, original certified record p. 53), that they had never seen a 30-60 horse-power oil tractor before this one, and that it was the only one that they ever saw operating in the field, and that the only place they ever saw it operate was at Nelson's place.

Plaintiff in error in its brief has indulged in a mathematical calculation to show that in 46 days the engine could have plowed approximately 1500 acres. The difficulty with this calculation is that it is based on wrong premises and assumed that the machine would make the *maximum* speed of a mile and a quarter an hour all the time drawing three gang plows, and working every hour, minute and second of the time. Another difficulty with the calculation is that it has been treated as a mechanical, scientific and mathematical problem, whereas Nelson's requirements were practical. We have heretofore shown that the time during which the engine was operated or could be operated was 34½ days, but plaintiff in error insists upon 46 days. This he obtains by including Sundays, and also apparently including the time from April 11th to April 16th, but there is no testimony to show that the engine was worked or could be worked during that time. The assumption is also made that no stops would be made for fuel, oil or water, or for lunch for the workmen. The calculation failing to show 32 or 33 acres per day, counsel claims that the difference could be made up by using one more gang plow, but the testimony was that it was necessary to

drop one plow at times because the engine could not pull three plows. (Trans. p. 52, original certified record p. 54). Also (Trans. p. 59, original certified record p. 61). The actual fact is that the machine worked for 34½ days and plowed 585 acres, or an average of about 17 acres per day, and this did not meet the requirements of the defendant.

We believe that we have shown that the evidence amply justified the finding as to the failure of the warranty of the engine to be adequate for the work of defendant in error as to plowing in that it could not do the work within the time required; as to harvesting in that it could not make sufficient speed to successfully operate a combined harvester; and again as to plowing in that there were certain portions of the land which it would not plow at all, cutting down the acreage a great deal.

We have now discussed all assignments of error pointed out and believe that the trial court should be upheld in its conclusions and judgment.

Plaintiff in error in concluding its brief states that reason and equity favor a judgment for plaintiff in error rather than for defendant in error. In reply thereto we wish to say that the defendant in error refrained from rejecting the engine because of the representations, promises and statements of the plaintiff and its agents, and that he was led into a position which is now attacked because he trusted these people, and they

now say that he had no right to trust them. It should be recalled that this engine was an experimental engine; that the testimony clearly shows that no engine of this horse-power and particular design had ever been used in Southern California; and that neither of the men sent out to test and demonstrate this engine had ever seen one operate in the field before. It is very plain that this engine did not do the work and could not be made to do the work. Plaintiff in error says that the use of the machine made a second-hand engine of it. If this be true it would seem that it is a very poorly constructed machine if the use for 34 days of a $3600.00 horse-power tractor would cause it to depreciate so much in value. As a matter of fact the tractor is worth nothing to the defendant. It would be ruinous to him to require him to keep it and pay the price that is asked for it, together with counsel fees, since it is absolutely worthless to him. We do not believe that plaintiff in error should be permitted to take advantage of the defendant in error because he relied upon the representations and promises made to him, and because he was giving to the plaintiff in error every opportunity to make good its promises. We do not believe that good conscience or good morals or good law will permit this defendant in error to be required to pay $3600.00 with interest and counsel fees for a worthless engine which did not meet his requirements merely because he listened to the promises and representations of the plaintiff in error

that it would make the machine adequate, and relied upon them.

For the reasons stated herein we thoroughly believe that the judgment of the trial court should be affirmed.

(All italics ours).

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